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Pretextual Use of Search Warrants in Federal White Collar Criminal Investigations of Legitimate Businesses to Conduct Custodial Interrogations of Targets, Employees, and Occupants: Can They Really Do That?

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I. INTRODUCTION[1]

A. Exemplary Situations

Scenario No. 1: Suppose that you are an office manager supervising two other employees in a small business devoted to providing ambulance transportation to local residents. The business is suddenly raided by nine federal agents, some of whom are armed and one of whom is wearing a bulletproof vest. All of the employees are ordered to congregate in one location and initially not allowed to leave. The officers then start separately "interviewing" individual employees. One officer, with a prepared, written script of questions, has been assigned to interview you. Some of the employees are finally allowed to go to lunch, but carry paging devices with them in case the officers "need" them. You are never apprised of your *Miranda* rights by the federal agent who has engaged you in questioning while your

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* The authors are members of the law firm of Perroni, James & House, P.A. located in Little Rock, Arkansas. The firm's practice is primarily concentrated in the areas of white collar criminal defense and commercial litigation. In the district court case underlying the appeal in *United States v. Shirley Wallace*, (which is discussed at depth in this article), attorneys at the firm represented two of Ms. Wallace's codefendants. 323 F.3d 1109 (8th Cir. 2003).

1. This article primarily relates to white collar criminal investigations of individuals and entities by federal law enforcement officials, and necessarily focuses upon federal law, practices and procedures. It does not address state authorities, rules, or practices notwithstanding that most of the guarantees in the Bill of Rights have been held applicable to the states. *See* U.S. CONST., amend. XIV; Duncan v. Louisiana, 391 U.S. 145, 148 (1968); Malloy v. Hogan, 378 U.S. 1, 6 (1964) (holding the Fifth Amendment applicable to the states). The article also places greater emphasis on cases emanating out of the United States Court of Appeals for the Eighth Circuit rather than those from other federal circuits.

Furthermore, this article only applies to investigations of inherently legal businesses. It was not written envisioning specific application to businesses which have as their primary focus inherently illegal operations, such as drug houses, houses of prostitution, gambling houses, or those harboring other illicit activities. Finally, for the purpose of this article, the search warrant is assumed to have been properly issued, valid, and did not facially authorize the detention, arrest, or interrogation of persons.

fellow employees are away from the business.[2] You are subsequently indicted for Medicare fraud, and the federal prosecutors seek to use statements you made to the agent against you as evidence of criminal wrongdoing. Can they really do that? Yes, according to the United States Court of Appeals for the Eighth Circuit in *United States v. Shirley Wallace*.[3]

Scenario No. 2: Suppose that you are a prominent physician who, after lunch, stops by an adult novelty store to purchase a surprise for your wife. You have the bad misfortune of being present at the store when it is raided by federal agents upon suspicions of tax evasion. The officers force all of the customers to place their hands upon their heads, sit on the floor in the middle of the store, and then record the identifications of and other details about each customer. You are never arrested for any crime, but now have concerns that your name is on some sort of list which could be disseminated in and throughout the community.[4] Can they really do that? Of course they can. After all, there is no way that you would actually file a complaint or sue (because of the potential embarrassment involved) and, even if so, under what legal theory and for what types of damages would you sue?

Scenario No. 3: Suppose that you are an outside insurance broker for a large insurance company that is raided by law enforcement officers after a bookkeeper, who was caught embezzling, convinced authorities that other illegal activity was taking place at the insurance company. During the execution of a search warrant, you are lined up against the wall with other individuals at the insurance company, forced to place your hands upon your head and stare into the barrels of guns being pointed at you, told that you may not leave, told that you may not make a phone call, and are then interrogated without any mention of your *Miranda* rights. Criminal charges are subsequently filed against certain officers of the insurance company, but not you.[5] Can they really do that? Again, of course they can. You were never charged with any crime. As a legal matter, what standing do you have to challenge it? As a practical matter, what are you going to do about it? Regardless of whether a violation of your own rights took place, you were just happy to eventually leave the premises.

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2. As will be discussed, the phrase "*Miranda* rights" is the popular term used to describe the various statements that the United States Supreme Court held that law enforcement officials must make to individuals prior to conducting custodial interrogations. *See* Miranda v. Arizona, 384 U.S. 436, 444 (1966). "Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Id.*

3. 323 F.3d 1109, 1113–14 (8th Cir. 2003).

4. A somewhat similar situation, loosely based upon these facts, was faced by a professional acquainted with one of the authors and seeking legal advice.

5. This is another incident which actually transpired and about which one of the authors was informed after its occurrence.

Scenario No.4: Suppose that you are a mail room employee of a bank and are summoned to the institution by bank inspectors who are investigating the disappearance of various pieces of mail. You are interrogated in the bank president's office for an hour and a half and make various incriminating statements prior to being read your *Miranda* rights. During the questioning you are seated between two government inspectors, facing the president's desk at which a bank security officer is seated. You are not told that you are free to leave or that you do not have to answer questions. The bank inspectors eventually inform you that they are investigating the disappearance of Canadian money and ask if they can look in your wallet. You comply with the request and the agents discover $63.00 in Canadian currency and a bearer check, both of which constitute marked items that the inspectors had placed in the mail trays. After the agents explain this to you, you make various incriminating statements before being warned of your *Miranda* rights. You then write a statement admitting guilt. You are not arrested and are allowed to go home after the interview. However, you are later arrested and charged with a crime. Can they really do that? Surprisingly, the Court said "no" in *United States v. Carter*[6] and suppressed the statements in a subsequent criminal prosecution.

B. Observations of Problems Presented in Such Instances

The authors of this article are increasingly being confronted with scenarios in white collar criminal cases in which targets of investigations, employees, and occupiers of legitimate businesses are interrogated by federal agents during the execution of valid search warrants. More often than not, these interrogations are conducted at the request of, or with the knowledge of, Assistant United States Attorneys working with federal agents on a case. Most, if not all, of the documents and things that constituted the subjects of the search could have been obtained via grand jury subpoenas.[7] In the latter

6. 884 F.2d 368–370 (8th Cir. 1989). Note that *Carter*, like the overwhelming majority of custodial interrogation cases, did not involve an interrogation in connection with a search warrant.

7. Federal agents and other government officers may perhaps contend that searches and seizures are necessary to prevent the destruction of evidence. If this is so, why are search warrants used in some cases and not others? In this day and age of computers, facsimile machines, electronic mail, and high-speed copiers, it is increasingly difficult to completely destroy or hide evidence such as business records. Moreover, many of the records typically seized in federal white collar criminal investigations are required to be maintained (or in practice are maintained) for varying time periods, *e.g.*, tax records, Medicare and Medicaid billings, banking records, and numerous other records utilized in various trades and industries. Because so many white collar criminal cases involve the prosecution of regulated individuals and entities, many of the documents which are sought to be introduced into evidence by the prosecution were once previously submitted by the prosecuted individuals and entities

scenario, however, the subjects of the search had an opportunity to consult with legal counsel. In the former scenario, the agents on the case enjoyed a golden opportunity to use the guise of executing a search warrant to improperly conduct custodial interrogations.[8]

With few exceptions, the only time the legality of an interrogation arises is when the person being interrogated has been indicted for a crime. As a practical matter, forced "in-custody" interrogations of individuals who are not indicted will rarely come before the courts for several reasons. First, civil suits for wrongful interrogations are rare and not generally successful.[9] Second, in a criminal setting, even if the forced in-custody interrogation of an employee is legally improper, generally only the person who makes the improperly obtained confession has standing to challenge its validity.[10] As a result, many abuses are never meaningfully addressed. The issue is thus left for debate by academics and authors of law review articles.

The government's typical argument is that the officials were legally on the premises pursuant to a lawfully issued search warrant that authorized a search of the premises. Further, the government will typically contend that the target, employee, or occupant was not legally compelled to answer questions, but actually voluntarily submitted to the answering of questions (or even initiated the exchange). The authors submit that these arguments ignore the totality of the circumstances, *i.e.*, the reality of the scene at the time of the interrogations, as well as the fact that the search warrants typically convey no express or implied authority to conduct interrogations.

When executing a search warrant, law enforcement officials have limited authority to enter and take control of premises via the temporary detention of individuals at the scene.[11] Whether in a business or in a home, these detentions—which more often than not "ripen" into interrogations—are serious intrusions which should be strictly curtailed under the Bill of

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to the government (*e.g.*, to receive payment for services rendered to a governmental beneficiary, as evidence of regulatory compliance, etc.) and hence were already in the government's possession prior to the search taking place.

8. It is the authors' experience that the government all too often tends to label such encounters as mere "interviews." More often than not, however, such "interviews" result in compelled confessions or coerced admissions which often serve as the backbone of a prosecution's case-in-chief.

9. *See* Hampton v. Gilmore, 60 F.R.D. 71, 80–81 (E.D. Mo. 1973), *aff'd without op.*, (8th Cir. 1973) (holding that officer's failure to give plaintiff *Miranda* warnings prior to questioning did not form basis for liability under 42 U.S.C. § 1983); *but see* Warren v. City of Lincoln, Neb., 816 F.2d 1254, 1262–63 (8th Cir. 1987) (finding that trial court erred in dismissing civil rights action brought by arrestee against city because testimony at trial put into issue question of whether police department failed to properly train officers, resulting in wrongful interrogation of arrestee).

10. *See* Salvucci v. United States, 448 U.S. 83, 85 (1980);Alderman v. United States, 394 U.S. 165, 171–72 (1969).

11. Michigan v. Summers, 452 U.S. 692, 705 (1981).

Rights.[12] To allow officers to exceed the limited scope of the search warrant and occupy legitimate businesses—not for the sole purpose of executing the search warrant, but also for the unstated purpose of improperly interrogating individuals under the guise of merely executing the search warrant—is a gross abuse of power and a constitutional violation. Employers, who are likely initial targets of the investigation and later defendants, lose control not only of their businesses, but also of their personnel for this often extended period of time. Regardless of whether the employer is a business or an individual, the employer will generally have no standing to object to interrogations of third persons, such as employees, during this period of time.[13] Paradoxically, these employees typically remain on the employer's payroll during the periods of these searches and, in some instances, may be able to bind their employers with damaging admissions.[14]

In these situations, law enforcement officials have created custodial interrogation situations for those persons unfortunate and unlucky enough to be present on the premises at the time of a search. Typically, these persons are not free to leave and are restrained for a period of time. During this custodial period, targets, employees, and occupants alike are interrogated as part of the officers' execution of the search warrants, albeit such interrogations are not envisioned by the warrant or in the affidavit supporting the warrant. Courts should recognize the custodial nature of these interrogations and afford these individuals the full protections granted to them under the United States Constitution, the Bill of Rights, *Miranda,* and its progeny.

II. SEARCHES UNDER THE FOURTH AMENDMENT AND CUSTODIAL INTERROGATIONS UNDER THE FIFTH AMENDMENT

A. The Fourth Amendment

One of the cornerstones of the Bill of Rights is the Fourth Amendment, which addresses unreasonable searches and seizures and provides that:

> [t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no [w]arrant shall issue, but upon probable cause, supported by [o]ath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[15]

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12. Miranda v. Arizona, 384 U.S. 436, 457–58 (1966) (holding that "The current practice of incommunicado interrogation is at odds with one of our Nation's most cherished principles—that the individual may not be compelled to incriminate himself").

13. *Alderman*, 394 U.S. at 171–72; *Salvucci*, 448 U.S. at 85.

14. *See* FED. R. EVID. 801(d)(2)(A)–(E).

15. U.S. CONST. amend. IV.

The plain language of the Fourth Amendment itself reflects that its applicability extends both to searches and seizures of property, as well as seizures, *i.e.*, arrests, of persons. Accordingly, a warrant will usually be required before a search or seizure may take place unless "exigent circumstances" (such as imminent destruction of evidence, possible harm to persons, searching in "hot pursuit" for a subject, etc.) exist.[16]

When a search warrant is issued to a law enforcement officer, the Fourth Amendment explicitly states that it may only be issued after a showing of "probable cause."[17] The Fourth Amendment itself does not generally require that a search or seizure conducted without a warrant occur only upon a showing of "probable cause" (*i.e.*, a "stop and frisk" may occur when a law enforcement officer possesses a mere "reasonable suspicion").[18] However, the case law interpreting the Fourth Amendment has generally imposed such a requirement.[19] Whether or not a search or arrest warrant is issued upon probable cause in a given instance, the actual search or arrest must not be "unreasonable" in nature.[20] "[T]he Fourth Amendment governs all intrusions by agents of the public upon personal security, and [makes] the scope of the particular intrusion, in light of all the experiences of the case, a central element in the analysis of reasonableness."[21]

A search or seizure envisioned by the Fourth Amendment occurs only when a "reasonable expectation of privacy" possessed by a person has been violated.[22] Reasonableness is determined "by balancing the need to search [or seize] against the invasion which the search [or seizure] entails."[23] A

16. *See* United States v. Place, 462 U.S. 696, 701 (1983); Warden, Md. Penitentiary v. Hayden, 387 U.S. 294, 298–99 (1967).

17. *See also* FED. R. CRIM. P. 41(c). Probable cause exists when "the facts and circumstances within their [the agents'] knowledge, and of which they had reasonably trustworthy information . . . [are] sufficient in themselves to warrant a man of reasonable caution in the belief that . . ." a crime has or is being committed, and property subject to seizure can be found on the person or at the place to be searched. Carroll v. United States, 267 U.S. 132, 161–162 (1925). A full exploration of the doctrine of "probable cause" is beyond the scope of this article.

18. *See* Terry v. Ohio, 392 U.S. 1, 27 (1968).

19. *See* Katz v. United States, 389 U.S. 347, 357 (1967) (holding that searches not conducted pursuant to a warrant are presumed unreasonable unless they fall into certain exceptions, *e.g.*, search incident to arrest).

20. *See* U.S. CONST. amend. IV.

21. *Terry*, 392 U.S. at 19.

22. *See* Rawlings v. Kentucky, 448 U.S. 98, 106 (1980); Pennsylvania v. Mimms, 434 U.S. 106, 108–09 (1977) (per curiam) (finding that "[t]he touchstone of our analysis under the Fourth Amendment is always 'the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security.'"); *Katz*, 389 U.S. 347, 350–51 (1967).

23. *Terry*, 392 U.S. at 21 (quoting Camara v. Mun. Court, 387 U.S. 523, 537 (1967)); *see also* Illinois v. McArthur, 531 U.S. 326, 332 (2001) (stating that "[R]ather than employing a *per se* rule of unreasonableness [in this case], we balance the privacy-related and law

"reasonable expectation of privacy only exists when a person (1) possesses an actual, subjective expectation of privacy and (2) such expectation is one that society recognizes as being "reasonable."[24]

Deterrence of Fourth Amendment violations by law enforcement officers is the primary purpose of the "exclusionary rule."[25] The exclusionary rule prohibits the prosecution's admission of physical and testimonial evidence that was illegally gathered in violation of a defendant's constitutional rights.[26] In certain circumstances, the evidence can be introduced despite legal deficiencies.[27] The "fruit of the poisonous tree" doctrine, while not restricted solely to Fourth Amendment applications, may also be utilized to exclude evidence upon demonstration of a Fourth Amendment violation and it precludes introduction of indirect or derivative "fruits" of an earlier violation of one's rights.[28]

B. The Fifth Amendment

1. *General Principles*

Just as the Fourth Amendment provides significant protections to those who are direct or indirect targets of government intrusion, the Fifth

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enforcement-related concerns to determine if the intrusion was reasonable").

24. *See* O'Connor v. Ortega, 480 U.S. 709 (1987).

25. Stone v. Powell, 428 U.S. 465, 486–89 (1976). *See also* United States v. Fletcher, 91 F.3d 48, 52 (8th Cir. 1996); Williams v. Nix, 700 F.2d 1164, 1174 (8th Cir. 1983), *rev'd on other grounds*, Nix v. Williams, 467 U.S. 431 (1984). The exclusionary rule is a judicially created doctrine designed to prevent the gathering of evidence in violation of the United States Constitution by law enforcement officers. United States v. Caceres, 440 U.S. 741 (1979). However, the rule is not triggered when evidence has been collected in violation of administrative regulations. *Id.* at 751–52. The full extent and scope of the exclusionary rule is beyond the scope of this article.

26. Wong Sun v. United States, 371 U.S. 471, 485 (1963). Theoretically, other remedies are available (*e.g.*, criminal prosecution of the law enforcement officer; the institution of a tort action against a law enforcement officer, law enforcement entity, municipality or state). Rollins v. Farmer, 731 F.2d 533, 536 (8th Cir. 1984). Dismissal of all charges where there is demonstrable prejudice or a substantial threat thereof to the defendant, is also a remedy. United States v. Morrison, 449 U.S. 361, 365 (1981).

27. *See, e.g.*, United States v. Leon, 468 U.S. 897, 922 (1984) (holding that a warrant suffering from technical problems will not necessitate suppression if the law enforcement authorities acted in good faith). Of course, the introduction of the evidence, even for a different stated purpose, undoubtedly has an effect on the jury who hears or sees it and the defendant who is prejudiced by it.

28. *Wong Sun*, 371 U.S. at 484 (citing Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920)). The foregoing discussion of the Fourth Amendment has been provided to generally acquaint the reader with certain principles necessary for understanding the topic of this article. The sheer scope of Fourth Amendment jurisprudence necessarily limits the depth of such discussion and the reader is warned that numerous qualifications exist with respect to each legal principle.

Amendment provides in pertinent part that "no person . . . shall be compelled in any criminal case to be a witness against himself . . . ."[29] "These precious rights were fixed in our Constitution only after centuries of persecution and struggle."[30] "We sometimes forget how long it has taken to establish the privilege against self-incrimination, the sources from which it came and the fervor with which it was defended."[31] The authors submit that one such instance in which the privilege has been forgotten (or ignored) is when federal law enforcement officials conduct custodial interrogations of targets, employees, and occupants of a legitimate business under the pretext of merely executing a search warrant at that business.

The Fifth Amendment is especially relevant with respect to the balance between law enforcement interrogation of suspects as an effective means of fighting crime and the societal interest in protecting individuals against abusive police tactics.[32] The restraints society must observe consistent with the United States Constitution in prosecuting individuals for crime go "to the roots of our concepts of American jurisprudence."[33]

This tension was exemplified in *Escobedo v. Illinois*,[34] wherein Justice Goldberg, writing for a majority of the Court, wrote that "a system of criminal law enforcement which comes to depend on the 'confession' will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation."[36] However, in dissent, Justice White argued that hindering law enforcement's use of confessions will cripple law enforcement and result in "its task [being] made a great deal more difficult . . . for unsound, unstated reasons, which can find no home in the provisions of the Constitution."[35]

2. Miranda v. Arizona

Since the mid-1960's, the landmark case of *Miranda v. Arizona*[36] has governed the use of confessions in federal and state proceedings. It requires that, as a procedural safeguard, an individual must be warned about his

29. U.S. CONST. amend. V.
30. Miranda v. Arizona, 384 U.S. 436, 442 (1965).
31. *Id.* at 458.
32. *See id.* at 479. *Miranda* states that:
> A recurrent argument made in these cases is that society's need for interrogation outweighs the privilege. . . . [T]he Constitution has prescribed the rights of the individual when confronted with the power of government when it provided in the Fifth Amendment that an individual cannot be compelled to be a witness against himself. That right cannot be abridged.
33. *Id.* at 439.
34. 378 U.S. 478, 488–89 (1964).
35. *Id.* at 499.
36. *Miranda*, 384 U.S. at 436.

rights, inclusive of his privilege against self-incrimination, before "an individual is taken into custody or otherwise deprived of his freedom by authorities in any significant way and is subjected to questioning." Before *Miranda* is triggered, however, three requirements must be satisfied: (1) the person must have been taken into "custody," (2) a confession must have resulted from "interrogation," and (3) the custody and interrogation must have been initiated and conducted by law enforcement authorities.[37] Once *Miranda* is triggered the suspect's *Miranda* warnings must be given.[38]

A corollary of the above principles is that statements obtained from a suspect in violation of the *Miranda* rules will be precluded from being admitted by the prosecution against the suspect in a criminal proceeding.[39] *Miranda* clearly relies upon the Fifth Amendment as the foundation for its holding to the extent that it correctly recognizes custodial interrogations as being inherently coercive and likely to compel confessions against the Fifth Amendment's clear intent.[40]

It is well-established that once a suspect is given his *Miranda* rights, these rights may be exercised at any point during the questioning whereupon such questioning must immediately cease.[41] These rights may also be waived; however, such a waiver will only be effective if knowingly and intelligently made.[42]

3. *"Custody" and "Interrogation"*

The issues of what constitutes "custody" and what constitutes an "interrogation" bear special attention because they are primary issues arising in situations wherein federal law enforcement officials pretextually use search warrants in white collar criminal investigations of legitimate businesses to conduct questioning of targets, employees, and occupants.[43] Under *Miranda*

37. *See id.* at 478–79.

38. *Id.* at 444–45. These warnings include: (1) the "right to remain silent," (2) the fact that anything he says can be used against him in a court of law, (3) "the right to the presence of an attorney," and (4) the fact that if he cannot afford an attorney, one may be appointed for him prior to any questioning.

39. *See* Michigan v. Tucker, 417 U.S. 433, 451–52 (1974).

40. *Id.* at 458 (holding that "no statement obtained from [a] defendant [in custody] can truly be the product of his free choice"); New York v. Quarles, 467 U.S. 649, 654 (1984) (finding that an interrogation of one in custody threatens the exercise of the Fifth Amendment privilege because custodial interrogation is "inherently coercive").

41. *Miranda*, 384 U.S. at 473–74.

42. *Id.* at 475. As with the previous discussion of the Fourth Amendment, the body of jurisprudence dealing with the Fifth Amendment is extensive such that in-depth discussion of individual topics like the *Miranda* warnings themselves, their invocation, and their waiver are beyond the scope of this article.

43. *Miranda* applies without regard to the seriousness of the crime involved or the severity of the sentence at issue. In other words, if a custodial interrogation takes place,

and its progeny, "custody" exists under any circumstances where the suspect is deprived of his freedom of action in any significant way.[44]

As "the formality of an arrest is not a prerequisite to a finding of custodial interrogation," we strongly submit that courts are drastically underestimating the "custodial" nature of detentions carried out during the course of executions of searches of legitimate businesses. In doing so, these courts are ignoring serious violations of individuals' Fifth Amendment rights to not be compelled as witnesses against themselves.[45]

For the purposes of *Miranda*, an "interrogation" occurs "whenever a person in custody is subjected to either express questioning or its functional equivalent" including "any words or actions on the part of the police . . . reasonably likely to elicit an incriminating response."[46] Courts have interpreted this to mean that no *Miranda* warnings need be given if law enforcement officials do not interact with the suspect but instead merely create a situation, or allow a situation to develop, wherein the suspect makes an incriminating statement.[47] Likewise, purely volunteered statements such as the spontaneous utterance of an incriminating statement without being questioned, do not trigger *Miranda*.[48]

Miranda warnings must first be given even if the suspect is charged with a minor traffic infraction with no possibility of imprisonment. Berkemer v. McCarty, 468 U.S. 420, 434–35 (1984).

44. United States v. Griffin, 922 F.2d 1343, 1347 (8th Cir. 1990) citing *Miranda*, 384 U.S. at 44; *Berkemer*, 468 U.S. at 429).

> In determining whether a suspect is "in custody" at a particular time we examine the extent of the physical *or psychological* restraints placed on the suspect during the interrogation in light of whether a "reasonable person in the suspect's position would have understood his situation" to be one of custody.

Id. at 1347 (quoting *Berkemer*, 468 U.S. at 442; United States v. Carter, 884 F.2d 368, 370 (8th Cir. 1989)); *see also* United States v. Martin, 63 F.3d 1422, 1429 (7th Cir. 1995) (stating that custody "implies a situation in which the suspect knows he is speaking with a government agent and does not feel free to the conversation; the essential element of a custodial interrogation is coercion").

> It is quite plain that the Fourth Amendment governs "seizures" of the person which do not eventuate in a trip to the station house and prosecution for crime - "arrests" in traditional terminology. It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has "seized" that person.

Terry v. Ohio, 392 U.S. 1, 16 (1968).

45. *Griffin*, 922 F.2d at 1347 n.3 (reversing conviction).

46. Rhode Island v. Innis, 446 U.S. 291, 301 (1980).

47. Arizona v. Mauro, 481 U.S. 520, 529–30 (1989) (stating in a 5–4 decision that no interrogation found where police set up meeting between husband and wife wherein husband made an incriminating statement).

48. *Miranda*, 384 U.S. at 478 (holding that "[v]olunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today").

As stated above, interrogation includes not only express questioning but also conduct by law enforcement agents which amounts to the "functional equivalent" of questioning.[49] Conduct is the functional equivalent of questioning when agents use words or actions that they should know are "reasonably likely to elicit an incriminating response from a suspect."[50] The primary focus of this inquiry is not on the intent of the officers, but on the perceptions of the suspect.[51] This focus reflects the basic constitutional concerns addressed in *Miranda*: the Fifth Amendment protection against compulsory self-incrimination.[52] The issue is not whether the police believe that certain actions might illicit a statement from a suspect, but whether a suspect would perceive such actions as requiring or requesting a response.[53]

Courts have wrestled with the question of what is an interrogation.

> Certainly not every question is an interrogation. Many sorts of questions do not, by their very nature, involve the psychological intimidation that *Miranda* is designed to prevent. A definition of interrogation that includes any question posed by a police officer would be broader than that required to implement the policy of *Miranda* itself.[54]

However, courts have also recognized:

> [t]he potential for abuse by law enforcement officers who might, under the guise of seeking "objective" or "neutral" information, deliberately elicit an incriminating statement from a suspect. *Thus we emphasize that . . . for whether questioning constitutes interrogation is whether, in light of all the circumstances, the police should have known that a question was reasonably likely to elicit an incriminating response.*[55]

Ordinarily, the routine gathering of background biographical data will not constitute interrogation.[56] Thus, while a detention might be permissible for purposes of conducting a search, it is not permissible for the purpose of asking questions designed to elicit incriminating statements.[57]

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49. *Innis*, 446 U.S. at 300–01.

50. *Id.* at 301.

51. *See id.* Nevertheless, the officers' intent is not irrelevant because it bears on whether they should have known that particular conduct was likely to evoke an incriminating response. *Id.*

52. *Mauro*, 481 U.S. at 526.

53. *Id.* at 526–27.

54. United States v. Booth, 669 F.2d 1231, 1237 (9th Cir. 1981) (citing *Innis*, 446 U.S. at 301).

55. *Id.* at 1238 (emphasis added).

56. *See* United States ex rel. Hines v. La Vallee, 521 F.2d 1109, 1112–13 (2d Cir. 1975), *cert denied*, 423 U.S. 1090 (1976). *See also* United States v. Lamonica, 472 F.2d 580, 581 (9th Cir. 1972) (inventory of suspect's belongings).

57. *See* Michigan v. Summers, 452 U.S. 692, 702 n.15 (1981); Dunaway v. New York,

Combining the concepts of "custody" and "interrogation," the Supreme Court has defined a "custodial interrogation" as "questioning by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."[58] "Thus, a suspect must be both in custody and subject to interrogation to trigger the *Miranda* warnings requirement."[59]

C. Conflict Between the Fourth and Fifth Amendments

When appearing before judges and magistrates to justify their requests for search warrants, law enforcement officers are typically not required to justify their plans in connection with interrogation of individuals located at the scene.[60] Indeed, officers may have a specific plan to detain and interrogate individuals and withhold these facts from the magistrate who issues the search warrant.[61]

While there are numerous cases generally discussing the *Miranda* factors and addressing the issue of whether a person is deemed to be the subject of a custodial interrogation, we have discovered few reported cases from the federal courts of appeals (at least from the facts stated in those decisions) in which federal agents patently used the pretext of a valid search warrant to conduct custodial interrogations of occupants of a legitimate business.[62] Many of the general *Miranda* cases are therefore *sui generis* to

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442 U.S. 200 (1979); *See also* United States v. Morales, 611 F. Supp. 242, 245–46 (S.D.N.Y. 1985), *reversed on other grounds*, 788 F.2d 883 (1986) (holding that "we focused primarily upon perceptions of the defendant rather than the intent of the police") (quoting *Innis*, 446 U.S. at 301).

58. Miranda v. Arizona, 384 U.S. 436, 467 (1966).

59. United States v. Salyers, 160 F.3d 1152, 1159 (7th Cir. 1998). *See* United States v. Shlater, 85 F.3d 1251, 1256 (7th Cir. 1996) (finding that custody is a prerequisite for determining whether an interrogation occurred).

60. *See supra* note 15 and accompanying text. As discussed, officers are only required to establish probable cause for the issuance of a search warrant.

61. The authors suggest that in connection with a search of a legitimate business, the officers have a duty to disclose these plans to a magistrate because the search warrant generally only gives the officers the right to search and seize items on the premises, not the right to conduct interrogations.

62. *See, e.g.*, United States v. Wallace, 323 F.3d 1109, 1110–11 (8th Cir. 2003) (search of ambulance transportation company in Medicare fraud investigation). A few other cases contain somewhat similar fact scenarios or emanate from other federal circuits. United States v. Crawford, 52 F.3d 1303 (5th Cir. 1995) (affirming district court's admission of statements made by defendants during the search of their electronics business for illegal cable television devices); United States v. Mahar, 801 F.2d 1477, 1499–50 (6th Cir. 1986) (search of a medical clinic in investigation of conspiracy to distribute controlled substances through medical clinic and mail fraud violations. *See also* United States v. Axsom, 289 F.3d 496 (8th Cir. 2002) (statements made at suspect's home during execution of a search warrant in a child pornography investigation). Of course, the fact that there may be relatively few reported

this specific scenario. In some scenarios, law enforcement officers have been entrusted with a search warrant for a specific purpose (*e.g.*, a search warrant authorizing the seizure of records) but have utilized it for a purpose other than that which was authorized (*e.g.*, to conduct custodial interrogations of targets, employees, and occupants of legitimate businesses).[63] An obvious conflict thus arises between the Fourth Amendment and the Fifth Amendment, to the extent that properly securing a search warrant pursuant to the Fourth Amendment is being used to improperly compel incriminating statements from individuals present during the execution of that search warrant in violation of the Fifth Amendment.[64]

That said, numerous courts of appeals have ruled that, based on the facts of the case, officers executing search warrants were not required to give *Miranda* warnings to persons merely being detained during the search before questioning occurs because this questioning is normally non-custodial in nature.[65] With the exception of *Wallace*, however, none of these cases dealt with interrogations conducted during the search of a legitimate business for its business records.

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cases containing such facts does not necessarily mean that it is not a common occurrence.

63. *See* discussion *supra* Part I.

64. *See* Michigan v. Chesternut, 486 U.S. 567, 573 (1988) ("A person has been 'seized' within the meaning of the Fourth Amendment . . . only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.") (quoting United States v. Mendenhall, 446 U.S. 544, 554 (1980)); United States v. Salyers, 160 F.3d 1152, 1159 (7th Cir. 1998) (finding that "[w]hen reviewing a district court's determination regarding the question of whether a suspect was in custody, this court has repeatedly directed that the trial judge make a specific finding as to "freedom to leave" in the Fourth Amendment context"); United States v. Burns, 37 F.3d 276, 278 (7th Cir. 1994) (finding that the defendant's "detention, pursuant to the search warrant, was a reasonable seizure under the Fourth Amendment"); *but see* Mapp v. Ohio, 367 U.S. 653, 657 (1961) (stating that "[t]he philosophy of [the Fourth and Fifth Amendments] and of each freedom is complementary . . . .").

65. *See, e.g.*, *Wallace*, 323 F. 3d at 1113–14; *Axsom*, 289 F.3d at 500–01 (upholding a search of a suspect's home for child pornography); United States v. Salyers, 160 F.3d 1152, 1155–1160 (7th Cir. 1998) (upholding a search warrant of a home for destruction devices); *Crawford*, 52 F.3d at 1304 (affirming district court's admission of statements made by defendant during the search of their electronics business for illegal cable television devices); *Burns*, 37 F.3d at 280–81 (affirming district court's denial of a motion to suppress as to statements made during execution of a search warrant for cocaine at defendant's hotel room); United States v. Ritchie, 35 F.3d 1477, 1485–86 (10th Cir. 1994) (upholding a detention of a suspect at his home during execution of a search warrant for evidence concerning an armed robbery); United States v. Richmann, 860 F.2d 837, 840–41 (8th Cir. 1988) (affirming a search of a suspected drug dealer's office; suspect advised of his *Miranda* rights); United States v. Rorex, 737 F.2d 753, 755–57 (8th Cir. 1984) (upholding a search of a suspect's office for stolen property). *See also* United States v. Saadeh, 61 F.3d 510 (7th Cir. 1995) (affirming district court's refusal to suppress statements made during a warrantless search of a car shop for cocaine).

The conflict between the Fourth and Fifth Amendments arising in the context of this article's envisioned factual scenario is best exemplified by *Michigan v. Summers*[66] and its progeny,[67] wherein an exception has been created to allow the temporary detention or seizure of individuals during searches.

The exception has been allowed to vitiate one of our most time honored rights—personal freedom:

> No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.[68]

The authors submit that, when executing search warrants, it is the agents rather than the legitimate businesses who control when the search takes place (*e.g.*, during peak business hours, when the maximum number of employees are present or when the business is closed). This control creates an environment for exploitive and pretextual interrogations.

While there may be valid reasons for the *Summers* exceptions, the justifications for these detentions or seizures, which are undoubtedly custodial in nature, simply do not apply to the search of legitimate businesses for business records. Further, even if a detention or seizure may be proper under the Fourth Amendment, it does not follow as *a fortiori* that such facts should automatically create an exception under the Fifth Amendment. Under *Miranda*, custody is custody and its protections should apply regardless of the validity of the underlying seizure.

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66. 452 U.S. 692 (1981).

67. *See* discussion *infra* Part III.A.2–3.

68. Terry v. Ohio, 392 U.S. 1, 9 (1968) (quoting Union Pac. R.R. Co. v. Botsford, 141 U.S. 250, 251 (1891)).

III. EXECUTION OF SEARCH WARRANTS FOR THE PRETEXTUAL PURPOSE OF CONDUCTING CUSTODIAL INTERROGATIONS IN VIOLATION OF *MIRANDA*

A. Execution of Search Warrants[69]

1. *General*

In the event that law enforcement authorities execute a search warrant, circumstances may arise in which they desire to search individuals present at the premises. If the officials develop probable cause to arrest someone on the premises, then they, of course, may arrest the person and conduct a valid search incident to arrest.[70] In the absence of probable cause to arrest upon suspicion of criminal wrongdoing, law enforcement officials may search the person if they have probable cause to believe that the person possesses items which are named in the search warrant.[71] Absent probable cause to arrest or to search a person for items named in a search warrant, a person merely present on the premises of a location being searched may not be personally searched if the person does not appear to be connected to the suspected criminal activity.[72]

2. Michigan v. Summers[73]

Nonetheless, the United States Supreme Court has recognized that when executing search warrants, the initial rounding up and temporary detention (as opposed to searches) of some individuals is justified under the Fourth Amendment.[74] The Court reasoned that "[t]he intrusiveness of detaining an occupant of the premises being searched [is] outweighed by the law enforcement interest in: (1) preventing flight; (2) minimizing the risk of harm to officers; and (3) conducting an orderly search."[75] Specifically,

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69. Again, the authors are assuming for the purposes of this article that the search warrant was properly issued by a neutral and detached magistrate, supported by an affidavit establishing probable cause, and contained a particular description of the premises to be searched and the things to be seized, but did not specifically authorize the detention of individuals for the purpose of interrogating them.

70. Chimel v. California, 395 U.S. 752, 762–63 (1969).

71. *See* Ybarra v. Illinois, 444 U.S. 85 (1979).

72. *Id.* at 91 ("[A] person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person . . . . Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person.").

73. 452 U.S. 692 (1981).

74. *See id.* at 705 (holding that "a warrant to search . . . founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted").

75. United States v. Reinholz, 245 F.3d 765, 778 (8th Cir. 2001) (citing *Summers*, 452

courts have held that officers executing search warrants have the right to secure the premises to be searched, both to assure their own safety and to guard against the destruction of evidence.[76]

3. *Limitations on Detentions and Interrogations*

The authority of officers in executing search warrants is not without limit. The *Summers* Court expressly reserved the question of whether detention would be justified if the search warrant authorized the seizure of evidence, rather than contraband.[77] Courts have also held that law enforcement officers cannot seize a person at another location and bring him to the site of the execution of the search warrant pursuant to *Summers*.[78] In *United States v. Reinholz*[79] the Eighth Circuit reasoned that an arrest in such a situation cannot be justified as a legitimate detention of an occupant of the premises to be searched. As discussed in detail *infra*, a careful analysis of the *Summers* decision clearly establishes that it does not justify the detaining and interrogation of targets, employees, and interrogation of legitimate businesses while executing search warrants absent first informing such individuals of their *Miranda* rights.

In determining the reasonableness of detentions and interrogations, courts often look at the duration of the detention. There is a fundamental difference between targets of a search and mere occupants of property which is being searched.

> Persons being arrested are ordinarily suspected of having committed serious, often violent, offenses. Persons being detained while a search of the house is being conducted may simply be visiting a home or business for an innocuous if not benevolent purpose. A detention conducted in connection with a search may be unreasonable if it is unnecessarily pain-

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U.S. at 701–03). *See also* United States v. Hogan, 25 F.3d 690, 693 (8th Cir. 1994). The authors submit that these interests are rarely actually triggered in the context of most federal, white collar criminal investigations of legitimate businesses. Because they are not typically triggered, these interests should no longer be deemed to outweigh the intrusiveness of detaining individuals present at the scene.

76. *See Summers*, 452 U.S. at 702; United States v. Axsom, 289 F.3d at 502–03 (8th Cir. 2002); United States v. Roby, 122 F.3d 1120, 1125 (8th Cir. 1997).

77. *See Summers*, 452 U.S. at 705 n.20; United States v. Rowe, 694 F. Supp. 1420, 1423 (N.D. Cal. 1988).

78. *See, e.g.*, Terry v. Ohio, 39 U.S. 1, 18 (1968) (stating that "a search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope")

79. *Reinholz*, 245 F.3d at 777–78.

ful, degrading, or prolonged, or if it involves an undue invasion of privacy.[80]

B. Consequences of Custodial Interrogations During Executions of Search Warrants

If the individual who is wrongfully interrogated during the execution of a search warrant is never charged with any criminal wrongdoing, it is highly unlikely (as a practical matter) that the law enforcement officer's actions will ever be reviewed by the courts. This is because there typically will not be a criminal proceeding in which the custody issues will be raised, unless someone else involved in the investigation was charged instead. Even in that event, however, the focus of any court hearing will be upon violations of the defendant's constitutional rights, not those of the one who was never charged.[81]

Further, civil liability will likely not be imposed upon the law enforcement officers, regardless of how egregious their actions were in con-

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80. *See* United States v. Place, 462 U.S. 696 (1983) (stating that "[w]e have never approved a seizure of the person [without probable cause] for the prolonged 90-minute period involved here and cannot do so on the facts presented by this case"); Levito v. Lapina, 258 F.3d 156 (3d Cir. 2001) (finding that detention of taxpayer and his wife during 8 hour search of business violated Fourth Amendment); United States v. Rodriguez, 68 F. Supp. 2d 104, 110 (D. Puerto Rico 1999) ("[d]efendant's detention and handcuffs during the close to three hours that the search lasted was unreasonably prolonged, especially after the agents had secured the premises and ascertained that Defendant was not armed"); Franklin v. Foxworth, 31 F.3d 873, 876 (9th Cir. 1994) (holding that the trial court erroneously concluded that the manner of execution of search warrant was reasonable where disabled occupant of residence to be searched was removed from his sick bed in a semi-naked state and forced to remain so in full view of twenty-three armed strangers); Renalde v. City and County of Denver, 807 F. Supp. 668, 672 (D. Colo. 1992) (handcuffing defendant and making him lie face-down on the floor for a prolonged period of time, even after initial sweep of his residence pursuant to a search warrant had revealed no weapons, held unreasonable and outside the scope of *Summers*); Daniel v. Taylor, 808 F.2d 1401, 1405 (11th Cir. 1986) (holding that law enforcement officers who detained plaintiff for two hours and forty-five minutes without probable cause while searching a business for business records were entitled to qualified immunity because they did not violate a clearly established constitutional right of plaintiff); United States v. Timpani, 665 F.2d 1 (1st Cir. 1981) (finding that forty-five minute detention during search not unreasonable); *id.* 2–3 (making defendant remain with agents and refusing to allow him to telephone his lawyer during the first forty-five minutes of a five-hour search for contraband at his house, in order to minimize the risk of sudden violence or frantic efforts to conceal or destroy evidence, was permissible under *Summers*); People v. Gabriel, 188 Cal. App. 3d 1261 (Ct. App. Cal. 1986) (upholding a ruling that defendant's Fourth Amendment rights were not violated because of his one and one-half to two hour detention during execution of valid search warrant); Baker v. Monroe Township, 50 F.3d 1186, 1192 (3d Cir. 1995) (recognizing that prolonged detention may ripen into an arrest).

81. Alderman v. United States, 394 U.S. 165 (1960).

ducting the wrongful interrogation. While a civil action theoretically could follow under 42 U.S.C. § 1983, such actions are few and far between. There are relatively few cases in which these reported actions have been filed relating to a wrongful custodial interrogation in violation of an individual's Fifth Amendment rights.[82] Of these types of cases, leave to proceed to trial was granted in only a handful of these matters.[83]

For instance, on May 27, 2003, in *Chavez v. Martinez*,[84] the United States Supreme Court reversed the Ninth Circuit's affirmance of a district court's ruling that an individual had stated a § 1983 claim against a police sergeant who had subjected him to a coercive interrogation after he had been shot by another police officer. A translation of the tape-recorded questioning in Spanish that had occurred revealed that the individual was in extreme pain, was being treated by medical personnel during the interrogation, and desired that the questioning cease.[85] The Court held that the law enforcement officer's failure to read *Miranda* warnings to the individual did not violate his constitutional rights nor constitute grounds for a § 1983 action.[86] Because he was never prosecuted for a crime and was never compelled to be a witness against himself in a criminal case, he could not allege a violation of any Fifth Amendment right.[87] The Court's opinion also noted that a failure to read one's *Miranda* rights, resulting in application of the exclusionary rule, does not constitute any "right" which has been violated but itself is only a "prophylactic measure to prevent violations of the right protected by the text of the [Fifth Amendment's] Self-Incrimination Clause]."[88] Justice Souter, in an opinion concurring in the judgment rendered by Judge Thomas' opinion, noted however that "[t]he question whether the absence of *Miranda* warnings may be a basis for a § 1983 action under *any* circumstance is not before the Court."[89]

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82. *See, e.g.*, Neighbour v. Cove, 68 F.3d 1508 (2d Cir. 1995) (stating that violation of *Miranda* rights would not form a basis for liability under 42 U.S.C. § 1983); Warren v. Lincoln, 864 F.2d 1436, 1442 (8th Cir. 1989) (finding that alleged *Miranda* violation not actionable under § 1983).

83. *See, e.g.*, Weaver v. Brenner, 40 F.3d 527 (2d Cir. 1994) (stating that alleged coercion of incriminating statement from suspect during custodial interrogation was actionable under 42 U.S.C. § 1983 though statement was not introduced at trial); Cooper v. Dupnik, 963 F.2d 1220 (9th Cir. 1992) (finding that cause of action was stated under 42 U.S.C. § 1983 wherein police interrogated him following improper advisement of *Miranda* rights, clear and unequivocal request to contact attorney, and use of psychological pressure to try and coerce confession).

84. 123 S. Ct. 1994 (2003).

85. *Id.* at 2010–11.

86. *Id.* at 2004.

87. *Id.* at 2000. *See also* U.S. CONST. amend. V ("[N]o person shall be compelled in any criminal case to be a witness against himself.").

88. *Chavez*, 123 S. Ct. at 2004.

89. *Id.* at 2007 (emphasis added).

Furthermore, even if a detention is found to violate the Fourth Amendment, individual liability to agents does not necessarily result. In *Levito v. Lapino*,[90] the Court held that the agent's detention of a taxpayer and his wife while search warrants were being executed violated the Fourth Amendment, but that the I.R.S. agents enjoyed qualified immunity as to all claims. Under the doctrine of qualified immunity, "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[91] The doctrine of qualified immunity "provides ample protection to all but the plainly incompetent or those who knowingly violate the law."[92] If the law is not clearly established (and it rarely is in Fourth Amendment cases) or a reasonable official could have believed the actions to be lawful, the official is entitled to immunity.[93]

Again, if the individual is charged with a crime, the best the defendant can usually hope for is that the evidence will be suppressed pursuant to the exclusionary rule or "fruit of the poisonous tree" doctrine, discussed in detail *supra*.[94] Moreover, illegally-obtained evidence may nonetheless be used for some purposes, such as to impeach a defendant's trial testimony, although it cannot be used in the prosecution's case-in-chief,[95] or be introduced against the defendant in a grand jury proceeding such as in *U.S. v. Calandra*.[96]

> Ever since its inception, the rule excluding evidence seized in violation of the Fourth Amendment has been recognized as a principal mode of discouraging lawless police conduct. Thus its major thrust is a deterrent one and experience has taught that it is the only effective deterrent to police misconduct in the criminal context, and that without it the constitu-

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90. 258 F.3d 156, 160 (3d Cir. 2001)

91. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). The full extent of qualified immunity is beyond the scope of this article.

92. Malley v. Briggs, 475 U.S. 335, 341 (1986).

93. *See Harlow*, 457 U.S. at 818; *see also* Karnes v. Skrutski, 62 F.3d 485, 492–94 (3d Cir. 1995).

94. *But see* United States v. Leon, 468 U.S. 897, 922 (establishing a "good faith" exception to the Fourth Amendment's exclusionary rule); Nix v. Williams, 467 U.S. 431 (1984) (recognizing an "inevitable discovery" exception if evidence would have been discovered by other police techniques, as well as an "independent source" exception which applies when law enforcement officials have two manners in which to procure evidence and only one is illegal); Wong Sun v. United States, 371 U.S. 471, 485 (1963) (recognizing "purged taint" exception wherein intervening events and factors between original illegality and discovered evidence render the link too tenuous to warrant application of exclusionary rule).

95. Harris v. New York, 401 U.S. 222, 225–26 (1971).

96. 414 U.S. 338 (1974).

tional guarantee against unreasonable searches and seizures would be a mere "form of words."[97]

IV. INDICIA OF WHETHER AN INDIVIDUAL IS "IN CUSTODY" FOR PURPOSES OF DETERMINING WHETHER *MIRANDA* IS IMPLICATED

A. Standard of Review—the *Griffin* Indicia & the Objective "Reasonable Suspect" Test

As discussed above, the *Miranda* doctrine only applies when an interrogation of an individual is "custodial" in nature.[98] In *United States v. Griffin*,[99] the Eighth Circuit developed a non-exhaustive list of six common indicia used to determine whether an individual is in custody. These factors, collectively and commonly referred to as the "*Griffin* test," include:

> (1) [w]hether the suspect was informed at the time of questioning that the questioning was voluntary, that the suspect was free to leave or [could] request the officers to do so, or that the suspect was not considered under arrest;
>
> (2) [w]hether the suspect possessed unrestrained freedom of movement during questioning;
>
> (3) [w]hether the suspect initiated contact with the authorities or voluntarily acquiesced to official requests to respond to questions;
>
> (4) [w]hether strong arm tactics or deceptive stratagems were employed during the questioning;
>
> (5) [w]hether the atmosphere of questioning was police dominated; [and]
>
> (6) [w]hether the suspect was placed under arrest at the termination of the questioning.[100]

"[I]n order to determine what constitutes custody for purposes of requiring *Miranda* warnings prior to questioning of an individual, one must look at the totality of the circumstances involved."[101]

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97. Terry v. Ohio, 392 U.S. 1, 12 (1968) (citations omitted).

98. *See* Miranda v. Arizona, 384 U.S. 436, 444 (1966) ("By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.").

99. 922 F.2d 1343, 1349 (8th Cir. 1990). As with most custodial interrogation cases, *Griffin* did not involve an interrogation in connection with a search warrant. Accordingly, *Griffin* and its progeny are not dispositive with respect to the specific issues raised and scenarios envisioned in this article. *See id.*

100. *Id.* at 1349; United States v. Axsom, 289 F.3d 496, 500 (8th Cir. 2002).

In applying the foregoing six indicia, the trial court is to conduct a balancing of the factors.[102] The determination is objective and the evaluation is conducted from the perspective of a "reasonable suspect."[103] Stated differently, the question is whether or not a reasonable person in the suspect's position would have believed that he was or was not in custody at that instant.[104] "An objective, reasonable person test is necessary to avoid (1) being dependent upon self-serving declarations of agents and of the defendant, and (2) placing the burden upon the agents to anticipate the frailties and idiosyncrasies of every person they question."[105] At least to most federal courts, the suspect's own subjective belief that he was not free to leave the encounter—as well as the law enforcement officer's own subjective intent to hold the suspect against his will—are deemed to be irrelevant.[106]

The objective "reasonable suspect" test obviously means that sometimes a custodial interrogation can be found, or not be found, regardless of the officer's subjective intention whether or not to hold the person. For example, if an officer has subjectively elected not to hold a suspect in custody, or has not yet decided whether the suspect being questioned is a serious-enough target to justify holding him, that subjective belief has been deemed irrelevant as to the issue of whether a reasonable person in the suspect's position would have believed that he was not free to leave. This was the scenario in *Stansbury v. California*,[107] wherein the Court held for the defendant, remanded the case for a determination based upon the objective "reasonable suspect" test, and observed that:

> [A]n officer's subjective and undisclosed view concerning whether the person being interrogated is a suspect is irrelevant to the assessment

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101. United States v. Carter, 884 F.2d 368, 370 (8th Cir. 1989) (finding that the conclusion concerning custody must arise from an examination of the totality of the circumstances) (citing United States v. Lanier, 838 F.2d 281, 285 (8th Cir. 1988)) (per curiam); United States v. Rorex, 737 F.2d 753, 755 (8th Cir. 1984).

102. *Axsom*, 289 F.3d at 501.

103. Berkemer v. McCarty, 468 U.S. 420, 442 (1984).

104. *Id.*

105. United States v. Wallace, 323 F.3d 1109, 1113 (8th Cir. 2003) (citing *Berkemer*, 468 U.S. at 442 n.35). In *Wallace*, which involved an employee who worked for an ambulance service in the Jonesboro, Arkansas area, the Eighth Circuit found that a Federal Bureau of Investigation raid and interrogation on the one-year anniversary of the infamous Jonesboro-area school shootings did not militate in favor of converting her non-custodial questioning into a custodial encounter. *Id.*

106. *Berkemer*, 468 U.S. at 442. Some federal courts have held, however, that although the subjective views of the officers and the suspect in custody are not determinative, they are "certainly relevant." *See, e.g.*, United States v. Ceballos, 2003 WL 21347194, (D. Neb. 2003). The *Ceballos* court stated that if the defendant considered the fire station interrogation to constitute an "arrest," "then the defendant's belief that the officers had taken him into custody and that he was not free to leave could be credited as reasonable." *Id.* at fn.1.

107. 511 U.S. 318, 442 (1994).

> whether the person is in custody. . . . [A]n officer's view concerning the nature of an investigation, or beliefs concerning the potential culpability of the individual being questioned, may be one among many factors that bear upon the assessment whether that individual was in custody, but only if the officer's views or beliefs were somehow manifested to the individual under interrogation and would have affected how a reasonable person in that position would perceive his or her freedom to leave.[108]

Likewise, in the event that a law enforcement officer subjectively intends to hold the defendant as a serious suspect, so long as that intention is never disclosed by the officer to the defendant and a reasonable person in the suspect's position would have believed he was free to leave, the defendant will not be deemed to have been in custody.[109]

"In deciding whether a person was 'in custody,' [courts will] examine both the presence and extent of physical and psychological restraints placed upon the person's liberty during the interrogation 'in light of whether a 'reasonable person in the suspect's position would have understood his situation' to be one of custody.'"[110] "Custody occurs not only upon formal arrest, but also under any circumstances where the suspect is deprived of his freedom of movement."[111]

Specifically, a person is considered to be in custody when he believes that "his freedom of action is curtailed to a degree associated with a formal arrest and . . . [if] that belief is objectively reasonable under the circumstances."[112] A court determines whether a suspect was in custody and entitled to *Miranda* warnings by asking "first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave."[113]

B. Aggravating and Mitigating Factors in the "Custody" Determination

Of the six *Griffin* indicia identified previously, "the first 3 indicia are mitigating factors which, if present, mitigate against the existence of custody at the time of questioning. Conversely, the last three indicia are aggra-

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108. *Id.* at 319–25.

109. *Berkemer*, 468 U.S. at 441–42.

110. United States v. Axsom, 289 F.3d 496, 500 (8th Cir. 2002) (quoting *Berkemer*, 468 U.S. at 442).

111. United States v. Hanson, 237 F.3d 961, 963 (8th Cir. 2001) (citing California v. Beheler, 463 U.S. 1121, 1125 (1983); United States v. McKinney, 88 F.3d 551, 554 (8th Cir. 1996)).

112. United States v. Griffin, 922 F.2d 1343, 1349 (8th Cir. 1990) (citing *Berkemer*, 468 U.S. at 439; *Beheler*, 463 U.S. at 1125).

113. Thompson v. Keohane, 516 U.S. 99, 112 (1995).

vating factors which, if present, aggravate the existence of custody." [114] It is not necessary to a finding of custody that all of the foregoing indicia be presented by the factual circumstances of a case and a particularly strong showing with respect to one factor may compensate for a deficiency with respect to other factors.[115] The following discussion addresses each of the *Griffin* indicia in the context of the pretextual use of search warrants in federal white collar criminal investigations of legitimate businesses to conduct custodial interrogations of targets, employees, and occupants.[116]

C. *Griffin* Factors Mitigating Against the Existence of Custody

1. *Whether the Suspect Was Informed at the Time of Questioning, that the Questioning Was Voluntary, that the Suspect Was Free To Leave or Could Request the Officers To Do So, or that the Suspect Was Not Considered Under Arrest*

Informing a suspect of his *Miranda* rights prior to interrogation is a significant factor mitigating against the existence of custody: The absence of police advisement that the suspect is not under formal arrest, or that the suspect is at liberty to decline to answer questions, has been identified as an important indicium of the existence of a custodial setting.[117]

In *United States v. Dockery*,[118] for example, no custody was found where the suspect was advised that she did not have to answer any questions. Further, she was advised that she was free to go and was not under arrest, nor was she going to be arrested. Moreover, she voluntarily initiated a second interview with the federal agents.[119]

Statements made by law enforcement officers themselves are perhaps the most telling signs of whether or not an individual can be deemed to be in "custody." If the law enforcement officer affirmatively informs the individual that he is not free to leave, then a reasonable person in the individual's

114. *Axsom*, 289 F.3d at 500–01.

115. *Griffin*, 922 F.2d at 1349 (citations omitted).

116. Bear in mind again, however, that *Griffin* involved neither the search of a legitimate business, investigation of a white collar crime, nor an interrogation in connection with the execution of a search warrant.

117. *Griffin*, 922 F.2d at 1349–50 (citations omitted).

118. 736 F.2d 1232, 1234 (8th Cir. 1984), *cert denied*, 469 U.S. 862 (1980).

119. *Id. See also* United States v. Lenier, 838 F.2d 281, 285 (8th Cir. 1988) (per curiam) (stating that freedom to leave the scene is a relevant factor in assessing the totality of the circumstances); United States v. Goudreau, 854 F.2d 1097 (8th Cir. 1988) (finding of non-custodial setting where suspect informed that interview was voluntary); United States v. Jones, 630 F.2d 613, 616 (8th Cir. 1980) ("[A]bsence of a formal arrest and the advice of freedom to decline to answer, while not conclusive, are indicative of non-custodial interrogation").

position, upon being told as much by a law enforcement officer, would obviously not in fact feel free to leave the scene. Conversely, where the law enforcement officer affirmatively states that no arrest is imminent and that the individual may terminate the conversation or leave the scene, such facts would (as envisioned in *Griffin*) militate against a finding of "custody."

However, what happens when, as in *Wallace*, the law enforcement official is completely silent with respect to whether the individual is free to leave or whether the individual is not considered to be under arrest?[120] It seems that when the law enforcement official is silent with respect to these issues—because the questioning is taking place in the context of the execution of a search warrant which itself is an extraordinary exercise of governmental power (i.e., to the extent that it requires "probable cause," etc.)—such circumstances should constitute an aggravating factor (not merely a mitigating one "when present"). In other words, when officers have not affirmatively stated one way or the other whether questioning is voluntary, whether the individual is free to leave, and whether the individual is not considered to be under arrest, the harried atmosphere of a search warrant being executed should be deemed to create a rebuttable inference of custody.

2. *Whether the Suspect Possessed Unrestrained Freedom of Movement During Questioning*

As stated previously, *Miranda* warnings must be given before interrogation begins when a suspect is taken into custody or "otherwise significantly deprived of his freedom of action."[121] The test is not merely whether [the suspect] believed he was free to leave; rather that his "freedom of action [was] curtailed to a 'degree associated with formal arrest.'"[122]

The mere fact that a suspect's freedom of action is curtailed does not, however, automatically result in a finding of custody. As one court has stated:

> [t]hough it is often the case that suspects are escorted or chaperoned during questioning for reasons unrelated to custody, as in this case where [the agent] testified that he was concerned for the safety of himself and

120. *See* United States v. Wallace, 323 F.3d 1109, 1112 (8th Cir. 2003).

121. Berkemer v. McCarty, 468 U.S. 420, 429 (1984); Miranda v. Arizona, 384 U.S. 436, 444 (1966).

122. *See Berkemer*, 468 U.S. at 440 (quoting California v. Beheler, 463 U.S. 1121, 1125 (1983)); United States v. Streifel, 781 F.2d 953, 961 (1st Cir. 1986). *See also* United States v. Richmond, 860 F.2d 837, 840–41 (8th Cir. 1988) (finding that a defendant drug suspect was not in custody during the search of his office as "[h]e was never denied permission to leave the office, nor did he ask to do so. He was denied permission to contact his wife. However, that does not constitute a significant deprivation of his freedom").

> his partner, "the relevant inquiry is the *effect on the suspect.*" *Carter*, 884 F.2d at 373, *citing Berkemer*, 468 U.S. at 422, 104 S. Ct. at 3141. The "bare fact of physical restraint does not itself invoke *Miranda*," (*Wilson v. Coon*, 808 F.2d 688, 689 (8th Cir. 1987)), only that restraint which is of a "degree associated with formal arrest." *Beheler*, 463 U.S. at 1125, 103 S. Ct. at 3520. We realize that the likely effect on a suspect of being placed under guard during questioning, or told to remain in sight of interrogating officials, is to associate these with a formal arrest. *Carter*, 884 F.2d at 372 (custody where suspect told "just stay here"); *Long*, 465 F.2d at 68 (custody where suspect continually chaperoned).[123]

Likewise, in *United States v. Rorex*,[124] questioning conducted at the suspect's place of employment was held not to be custodial when a federal agent questioned the suspect in his own office, because the agent "merely asked a few non-threatening questions . . . [and] made no attempt to restrict [the suspect's] freedom of action."[125]

In the context of a search being executed upon a legitimate business, courts must carefully examine whether the individual being questioned actually possessed unrestrained freedom of movement during the questioning. For instance, in *Wallace*, the Eighth Circuit noted the district court's finding that Wallace was restrained because agents corralled the employees at the onset of the search.[126] The court observed that employees used the restrooms, went outside to smoke, completed ambulance services off the premises, went to lunch, went shopping, and, after their interviews, returned to their full work duties.[127] The court then focused upon the individual's restraint during the interview and seemed to conclude that, because Wallace was not physically restrained immediately before or after the interview and

123. United States v. Grifin, 922 F.2d 1343, 1350–51 (8th Cir. 1990). United States v. Longbehn, 850 F.2d 450, 453 (8th Cir. 1988) (finding custody where suspect chaperoned and told he was not free to leave); United States v. Mahar, 801 F.2d 1477, 1500 (6th Cir. 1986) (stating custody found where suspect not permitted to move about during search and questioning); United States v. Venerable, 807 F.2d 745, 747 (8th Cir. 1986) (questioning at a suspect's place of employment not custodial where, during two relatively brief and non-coercive interviews, he made and received telephone calls and spoke during the interview with other employees, and left one interview for a period of time).

124. 737 F.2d 753, 757 (8th Cir. 1984).

125. Under even the most restrictive interpretations of "custody," a person is in custody when law enforcement officers seize the person to take him to the site of a search warrant for its execution. *See* United States v. Reinholz, 245 F.3d 765, 777 (8th Cir. 2001) (stating that officers seizing defendant at his workplace, having him stand "spread eagle" against his car, patting him down for weapons, handcuffing him, and placing him in the backseat of his car to take him to his residence for execution of search warrant, constituted a seizure). *See also* United States v. Tovar-Valdivia, 193 F.3d 1025, 1027–28 (8th Cir. 1999) (determining that defendant was under arrest when police officer handcuffed him).

126. United States v. Wallace, 323 F.3d 1109, 1113 (8th Cir. 2003).

127. *Id.*

because the interview was short in duration, that she probably was not restrained for purposes of a "custody" determination.[128] However, that conclusion contradicts the court's own rendition of the facts that "[the agent] initiated Wallace's interview by telling Wallace to come into the employee lounge" and "after the interview, [the agent] told Wallace she could leave."[129] Is such a statement really consistent with a mere "temporary detention" pursuant to execution of a search warrant, as envisioned in *Summers*, when it is clear that a federal agent directed Ms. Wallace into a room for an interrogation and then formally dismissed her once the agent completed her questioning?

Moreover, the mere fact that individuals are "allowed" to use restrooms, smoke, and eat—all of which relate to physical needs or strong cravings of the human body—is simply not indicative of a person being unrestrained. Can it really be said that an unelected government officer's act of allowing a mere bystander at the scene of a search to satisfy a basic, human urge constitutes *prima facie* evidence that the bystander's freedom was not in someway curtailed?

The fact that, as in the *Wallace* case, other employees were allowed to complete ambulance runs in response to medical emergencies (and in furtherance of that legitimate business's livelihood) also is not a sufficient factor militating in favor of a finding that individuals were not being restrained. Law enforcement officials would be strongly and appropriately criticized if they were to block such important activities absent a true need to restrain individuals on the premises during a search for items listed in a search warrant.

The focus should not merely be on the individual's restraint during the interview. In *Wallace*, for example, the government's search of the business was said to have lasted a number of hours but, because Ms. Wallace's "interview" lasted ten to fifteen minutes, her freedom could not be said to have been unduly restrained.[130] Clearly, an atmosphere of restraint and government intrusion prior to and after the interview could lead a "reasonable person" to believe that he or she felt in the custody of law enforcement officials.

128. *Id.*
129. *Id.* at 1110–11 (emphasis added).
130. *Id.* at 1193.

3. *Whether the Suspect Initiated Contact with the Authorities or Voluntarily Acquiesced to Official Requests To Respond to Questions*

In *California v. Beheler*,[131] the Supreme Court found there to be no custodial interrogation when the interview took place at a police station where the suspect had voluntarily gone to talk with officers. Likewise, in *Thatsaphone v. Weber*,[132] the suspect came to an interview voluntarily, was told he was not under arrest, and left without hindrance after a short interview. The detective in *Thatsaphone* advised that the interview was voluntary and that the suspect was free to leave.[133]

Therefore, if the interview process was voluntary and the individual was not directed to participate in the interview by law enforcement officers, courts often rule that suppression of statements made in the interview is not appropriate.[134] In *Rorex*, the defendant was neither placed in custody, nor was subject to the type of environment giving rise to the *Miranda* warnings. Likewise, in *Richmann*, the defendant repeated his statements after being given *Miranda* warnings.

As noted in *Miranda*, "custodial interrogation [means] questioning initiated by law enforcement officers."[135] Applying this factor, the Eighth Circuit has frequently found custody lacking where the suspect made the initial contact with law enforcement officers.[136]

> [W]hen the confrontation between the suspect and the criminal justice system is instigated at the direction of law enforcement officers, rather than the suspect, custody is more likely to exist. *Longbehn*, 850 F.2d at 451 (custodial interrogation initiated when police confronted suspect at the firing range); *Carter*, 884 F.2d at 369 (custodial interrogation initiated when police confronted suspect at work); *see also Minnick*, 498 U.S. at 152, 111 S. Ct. at 490 (prior invocation of Fifth Amendment privilege mitigated where "the accused himself initiate further communication, exchanges, or conversations with the police").[137]

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131. 463 U.S. 1121, 1122–23 (1983).

132. 137 F.3d 1041, 1045 (8th Cir. 1998).

133. *Id.*

134. United States v. Richmann, 860 F.2d 837, 840–41 (8th Cir. 1988); United States v. Rorex, 737 F.2d 753, 755–56 (8th Cir. 1984).

135. Miranda v. Arizona, 384 U.S. 436, 444 (1966).

136. United States v. Dockery, 736 F.2d 1232, 1234 (8th Cir. 1984) (finding no custody where suspect initiated the interview); Davis v. Allsbrooks, 778 F.2d 168, 170 (4th Cir. 1985) (finding no custody where the suspect voluntarily came to the station house for questioning two days after officers left a message at his home requesting a visit); Leviston v. Black, 843 F.2d 302, 304 (8th Cir. 1988) (affirming no custody where suspect initiated inquiry by voluntarily speaking with investigators).

137. *Griffin*, 922 F.2d at 1351.

When government officials are executing a search warrant upon the premises of a legitimate business, the very fact of the law enforcement officers' presence is the best evidence of their desire for information or things. In other words, their very (unexpected) appearance at the scene to execute the warrant, by definition, reflects that such presence was initiated by the law enforcement officers and not by the business being searched. Taking it one step further, it is patently obvious that any questioning which then occurs by officials at the scene, of individuals on the scene, will almost surely have been initiated by the law enforcement officers due to their stated purpose of executing the warrant.[138] It simply defies logic to suggest that, on the very day that the search and questioning occurs, the employer operating the business would have summoned the law enforcement officials to the business to engage them in communications, exchanges, or conversations.

Finally, in *Wallace*, the law enforcement officer's preprinted list of written questions made it clear that the law enforcement officers—not the interrogated individual—were the parties intent on engaging in conversation and questioning. If *Miranda* can be summarized as setting forth principles governing custodial interrogation questioning initiated by law enforcement officers, nowhere is this better evidenced than in a law enforcement officer's pre-search preparation of questions to ask individuals present at the scene of the execution of a search warrant.

Such questioning clearly does not constitute mere "general on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact finding process" which might constitute "an active responsible citizenship for individuals to give whatever information they have to aid in law enforcement."[139] To the contrary, evidence that the law enforcement agent possessed and utilized a customized, prepared questionnaire clearly reflects the pretextual nature of the search and evidences the official's clear intent to exceed the authority to temporarily detain granted the official by *Summers* and its progeny.[140] To ignore the significance of the previously-prepared questions ignores the reality of the situation, that is, that a pre-planned custodial interrogation took place under the guise of a mere search warrant execution, all in violation of Ms. Wallace's constitutional rights because her *Miranda* rights were never given.

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138. United States v. Beraun-Panez, 812 F.2d 578, 581(9th Cir. 1987) (finding custodial interrogation initiated when police drove to remote part of suspect's ranch where suspect was herding cattle to conduct questioning); United States v. Maher, 801 F.2d 1477, 1499 (6th Cir. 1986) (affirming custodial interrogation initiated when police executed search warrant on suspect's place of business).

139. Miranda v. Arizona, 384 U.S. 436, 477–78 (1966).

140. Michigan v. Summers, 452 U.S. 692, 705 ("[A] warrant to search . . . founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted").

D. *Griffin* Factors Which Aggravate the Existence of Custody

1. *Whether Strong Arm Tactics or Deceptive Stratagems Were Employed During the Questioning*

This indicia is clear—the use of strong arm or deceptive strategies weighs in favor of a finding of custody. For example, in *United States v. Hanson*,[141] the defendant initiated the interview with law enforcement officers, was told that he was not under arrest even though he was a suspect, and was permitted to leave the police station after the interrogation without being arrested.[142] While the district court found no custody, the Eighth Circuit reversed the trial court's finding. The court found that the agents had engaged in a deliberate subterfuge in obtaining his acquiescence to the interview because they did not inform him about the true nature of their interest in him as a suspect; the environment in which the interview was conducted was police dominated and intimidating; and the interview lasted for over two hours without Hanson being advised of his right to counsel.[143] The Court found that the circumstances under which the statements were made were so inherently coercive that Hanson must have known he was not free to leave the station once officers disclosed their real purpose for wanting to interview him.[144]

Likewise, the use of a search warrant to coerce interrogations of occupants of legitimate businesses at the scene of that search warrant's execution is a law enforcement tactic which would come within this factor. *Griffin* notes that:

> police deployment of strong arm tactics or deceptive stratagems during interrogation . . . is a practice widely condemned in American law. . . . An interrogation can still be custodial even though no strong arm tactics are used, . . . but the absence of such tactics is a factor which can assist us in reaching an objective conclusion that the suspect could not have associated the questioning with formal arrest.[145]

While in *Wallace*[146] the Eighth Circuit took note of the district court's conclusion that the law enforcement officials did not use strong arm tactics nor deceptive stratagems, the use of search warrant executions and subse-

141. 237 F.3d 961 (8th Cir. 2001).
142. *Id.* at 964.
143. *Id.*
144. *Id.* at 965.
145. United States v. Griffin, 922 F.2d 1343, 1351 (8th Cir. 1990).
146. United States v. Wallace, 323 F.3d 1109, 1112 (8th Cir. 2003).

quent abuse of the limited detention allowed officials by *Summers* and its progeny obviously constitutes a strong arm tactic or deceptive stratagem.[147]

Such interrogations are "strong arm" in the sense that the questioning was not initiated after, for example, a mere request left on a telephone answering machine to come by a police station. Rather, it was part and parcel of a surprise search by a number of storming, usually-armed, federal agents without any notice to those present at the scene. Such a sudden intrusion is as "strong arm" as officials can get in this day and age, as evidenced by the fact that the officials are generally required to first obtain a warrant only upon a showing of probable cause.

The tactic is "deceptive" in the sense that the officials who procure the warrant have failed to inform the neutral and detached magistrate that they also intend to question individuals at the scene (e.g., with a preprinted list of questions),[148] in addition to searching for items identified in the warrant which allegedly can be found at the premises. In other words, the magistrate is not informed as to the full nature of the intrusion and the true intentions of those doing the intruding. The very officials who purport to be enforcing the law are themselves, when securing search warrants to investigate supposed "criminal activity," making representations to federal courts under false pretenses.

2. *Whether the Atmosphere of Questioning Was Police Dominated*

A factor indicating custody is when, during questioning, the suspect is isolated from others who might lend support.[149] Related to this issue is whether the questioning was conducted in an environment in which the subject was less comfortable. For example, questioning in a police station would lean toward a police dominated interview.

The "good cop," "bad cop" approach is also indicative of a police-dominated atmosphere.[150] However, questioning a suspect at his residence

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147. The author submits that a presumption of impropriety should attach to any circumstance in which the officers use coercive interrogation techniques to obtain confessions. *See, e.g.*, United States v. Carter, 884 F.2d 368, 371 (8th Cir. 1989) (no good faith exception to "inadvertent" use of coercive interrogation tactics because inquiry concerns the effect of the interrogation techniques on the suspect).

148. As in *Wallace*, 323 F.3d at 1111.

149. *Carter*, 884 F.2d at 372; *see also* United States v. Beraun-Panez, 812 F.2d 578, 581 (9th Cir. 1987), 830 F.2d 127, 127–28 (9th Cir. 1987); *cf.* United States v. Jorgensen, 871 F.2d 725, 729 (8th Cir. 1989).

150. *Carter*, 884 F.2d at 372 (citing Miranda v. Arizona, 384 U.S. 436, 452, 455 (1966)) ("Mutt and Jeff" technique atmosphere indicative of coercive, police dominated atmosphere). "In th[ese] technique[s], two agents are employed. Mutt, the relentless investigator, who knows the subject is guilty and is not going to waste any time. He's sent a dozen men away for this crime and he's going to send the subject away for the full term. Jeff, on the other

would arguably be more comfortable.[151] "The place where an interrogation takes place does not conclusively establish the presence, or absence, of custody. "A deprivation of freedom may take place at one's home as well as at the police station. By the same token, an interrogation at the police station may be non-custodial."[152] In *Axsom*, for example, the defendant was advised that he was not under arrest but that the officers would like to speak to him if he would agree.[153] *Axsom* was permitted to dress before the interview since he answered the door wearing a towel. The interview was conducted in his living room where he sat in a chair smoking his pipe. He was provided a glass of water when he was thirsty. He was permitted to move about his residence and answer the telephone, although he was escorted to the restroom.[154]

Numerous cases have held that questioning at a suspect's place of employment is non-custodial in nature.[155] However, there can be no doubt that questioning during the execution of a search warrant is police dominated in nature. "Where the conduct of the police leads a suspect to believe that the police have taken full control of the scene, then [courts] are more likely to recognize the existence of custody."[156] Questioning at an individual's place of employment can, therefore, under some circumstances, be custodial in nature.

In *Carter*, a mail room clerk was questioned in the bank president's office by postal inspectors.[157] Such questioning constituted a custodial inter-

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hand, is obviously a kindhearted man. He has a family himself. He has a brother who was involved in a little scrape like this. He disapproves of Mutt and his tactics and will arrange to get him off the case if the subject will cooperate. He can't hold Mutt off for very long. The subject would be wise to make a quick decision. The technique is applied by having both investigators present while Mutt acts out his role. Jeff may stand by quietly and demur at some of Mutt's tactics. When Jeff makes his plea for cooperation, Mutt is not present in the room." *Miranda*, 384 U.S. at 452 (citations omitted). *See also* United States v. Hanson, 237 F.2d 961, 963 (8th Cir. 2001) (finding that the environment in which the interview was conducted was police-dominated and intimidating).

151. United States v. Axsom, 289 F.3d 496, 497 (8th Cir. 2002).

152. United States v. Jones, 630 F.2d 613, 615 (8th Cir. 1980) (citations omitted). *but see* United States v. Beraun-Panez, 812 F.2d 578, 582 (9th Cir. 1987) (questioning of suspect near where he was herding cattle held custodial); United States v. Mahar, 801 F.2d 1477, 1500 (6th Cir. 1986) (finding that subject questioned at place of employment held to be in custody).

153. *Axsom*, 289 F.3d at 497–98.

154. *Id.*

155. *See* United States v. Venerable, 807 F.2d 745, 747 (8th Cir. 1986); United States v. Rorex, 737 F.2d 753, 756 (8th Cir. 1984); United States v. Dockery, 736 F.2d 1232, 1234 (8th Cir. 1984), *cert. denied*, 469 U.S. 862 (1984).

156. United States v. Griffin, 922 F.2d 1343, 1352 (8th Cir. 1990); *but see Axsom*, 289 F.3d at 503 (finding that while execution of the search warrant was certainly police dominated, the interview between the two agents and Axsom was not).

157. United States v. Carter, 844 F.2d 368, 369 (8th Cir. 1989).

rogation because, under the facts of that case, the questioning did not take place at the employee's usual work station and because the officers told him not to leave.[158] Accordingly, the Eighth Circuit held that this police dominated atmosphere militated in favor of a custodial interrogation.[159]

Questioning pursuant to a search warrant being executed on a legitimate business premises will typically constitute a police-dominated atmosphere which militates in favor of a finding of custody for purposes of *Miranda*. Specifically, *Griffin* recognizes that the issue with respect to this fifth indicium of custody

> is whether the entire context of questioning, including such considerations as place and length of the interrogation, demonstrates that the course of the investigation was police dominated . . . . Other circumstances which indicate police domination of the custodial surroundings concern whether the police assumed control of the interrogation site and 'dictate the course of conduct followed by the [suspect]' or other persons present at the scene.[160]

Summers and its progeny teach that when law enforcement officials are executing a search warrant they are entitled to temporarily detain individuals during the execution of such warrant, thereby dictating the course of their conduct at the scene. There is also no doubt that, during the execution of such search warrants, law enforcement officials control the scene. It is patently obvious that the execution of a search warrant takes place in the context of a clearly police dominated atmosphere which should result in a presumption that a reasonable person would objectively feel as if they were in custody during any questioning which takes place during the search.

3. *Whether the Suspect Was Placed Under Arrest at the Termination of the Questioning*

The Eighth Circuit has opined that lack of an arrest constitutes a "very important" factor weighing against custody.[161] The issue is whether a reasonable person would believe he is under formal arrest. A reasonable person, for purposes of this determination, is also construed to be an innocent person.[162]

At least in the context of search warrants being executed upon inherently legal businesses, the fact that an arrest does not take place subsequent

158. *Id.*
159. *Id.*
160. *Griffin*, 922 F.2d at 1352 (quoting United States v. Jones, 630 F.2d 613, 616 (8th Cir. 1986)).
161. United States v. Sutera, 933 F.2d 641, 647 (8th Cir. 1991).
162. Florida v. Bostick, 501 U.S. 429 (1991).

to the interrogation is not nearly as important a criterion in such cases. To the extent that the investigation is a federal inquiry into alleged white collar criminal law violations, formal arrests are not nearly as common as they are in investigations involving so-called "street crime" such as murder, burglary, rape, robbery, and drug dealing.

Owners of legitimate businesses are often prominent, well-respected members of their communities, typically have families, friends, and colleagues in the area, and are therefore deemed to be unlikely candidates for escape. Many accused of white collar crimes are politically powerful and affluent, and many have businesses to operate and attend to pending any investigation or prosecution. These business owners are often accused of mere regulatory violations or of committing questionable acts with respect to "gray areas" in the law. These individuals, cloaked with these characteristics and charged with these types of crimes, are simply not as likely to be formally arrested following an interrogation as those accused of "street crimes." In such cases, law enforcement officials usually know where they can find the white collar criminal defendant if it indeed becomes necessary to arrest. More often than not, white collar suspects typically turn themselves in for booking when requested and no physical restraints, such as handcuffs, are typically used (at least perhaps until the individual is convicted, has exhausted his appeals, and is sent to a federal penitentiary).

Consequently, formal arrest does not play a prominent role in these cases such that the lack of an arrest subsequent to an interrogation cannot legitimately be considered as a factor militating against a finding of custody. In other words, law enforcement officers do not lack the intent to create a custodial atmosphere while executing a search merely because a formal arrest does not take place after an interrogation. It instead merely reflects the fact that white collar crime is investigated and prosecuted in a manner much different than other types of criminal cases.

V. SUGGESTED ADDITIONAL INDICIA FOR DETERMINING THE EXISTENCE OF A CUSTODIAL INTERROGATION IN THE CONTEXT OF SEARCH WARRANTS BEING PRETEXTUALLY UTILIZED TO QUESTION TARGETS, EMPLOYEES, AND OCCUPANTS OF LEGITIMATE BUSINESSES

A. The Argument for Additional Indicia

It is clear that the list of *Griffin* factors is not exhaustive:

> [r]ealizing that the available means of coercion are as vast as the circumstances in which it may arise, we emphasize that the foregoing list is merely intended to be representative of those indicia of custody most

> frequently cited by this and other courts when undergoing the prescribed totality of the circumstances analysis. *Lanier*, 838 F.2d at 285; *Helmel*, 769 F.2d at 1320.[163]

Again, "[t]he custody issue ultimately 'focuses upon the totality of the circumstances.'"[164]

B. Suggested Additional Indicia in Instances Involving Federal White Collar Criminal Investigations of Legitimate Businesses

Additional indicia should be considered by reviewing courts in determining whether custodial interrogations took place in the course of search warrants being executed on legitimate businesses. *Griffin* clearly affords the consideration of additional factors. Specifically, courts should review the totality of all the circumstances relevant to the questioning in dispute, inclusive of the factors identified below as well as the "regular" *Griffin* factors. Federal agents should simply not be allowed to enter legitimate businesses under the guise of a valid search warrant to conduct pretextual interrogations, which would otherwise not be proper. Additional criteria will assist courts in identifying situations and *Miranda* violations incident thereto.

1. *Whether the Business Being Searched is an Inherently Legal Business as Opposed to an Inherently Illegal Business*

a. Inapplicability of *Michigan v. Summers*

As stated previously, when executing search warrants, the initial rounding up and temporary detention by federal agents of employees and occupants at the scene has been justified by the United States Supreme Court.[165] This is purportedly because the intrusiveness of detaining occupants of the premises is outweighed by the law enforcement interests in (1) preventing flight, (2) minimizing risk to officers, and (3) "conducting an orderly search."[166] The justifications contained in *Summers* are simply not

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163. *Griffin*, 922 F.2d at 1349.

164. United States v. Chamberlain, 163 F.3d 499, 503 (8th Cir. 1998) (quoting Jenner v. Smith, 982 F.2d 329, 335 (8th Cir. 1993)). Additional factors should be considered because "all official questioning has some coercive aspects." *Sutera*, 933 F.2d at 647, (citing United States v. Rorex, 737 F.2d 753, 756 (8th Cir. 1984)). The authors note that in the post-Enron era of the federal government's purported "crackdown" on corporate crime, federal agents seem to more frequently parade prominent white collar criminal defendants in handcuffs in front of the television cameras. It is the authors' experience, however, that this is still the exception rather than the rule.

165. Michigan v. Summers, 452 U.S. 692 (1981).

166. *See* United States v. Reinholz, 245 F.3d 765, 778 (8th Cir. 2001).

applicable in the searches of legitimate business in which no arrests are planned. Significantly, the *Summers* Court expressly reserved the question of whether detention would be justified if the search warrant authorized the seizure of evidence in general, rather than mere contraband.[167] *Summers* had nothing to do with the search of a legitimate business. To the contrary, it involved the search of a residence for narcotics, *i.e.*, heroin, and not for business records.[168] The issue was whether Summers' pre-arrest seizure on the front porch of his house was constitutional.[169]

Quoting *Dunaway v. New York*,[170] the United States Supreme Court expressed its reservations concerning seizure exceptions to the Fourth Amendment: "[i]ndeed, any 'exception' that could cover a seizure as intrusive as that in this case would threaten to swallow the general rule that Fourth Amendment seizures are 'reasonable' only if based on probable cause."[171] In *Dunaway*, the Court reaffirmed the general rule that an official seizure of the person must be supported by probable cause, even if no formal arrest is made. The Court specifically held that the detention of a murder suspect located at a neighbor's house, who was taken into custody and transported to the police station where he eventually confessed, was "indistinguishable from a traditional arrest."[172]

The *Summers* Court held that the type of detention imposed in that case, i.e., the detention of one of the residents while their premises was being searched, was less intrusive than the search itself.[173] In so ruling, the Court "assumed" that, unless they intended flight to avoid an arrest, most citizens "would elect to remain in order to observe the search of their possessions."[174] The Court specifically ruled out any pretextual or exploitive reasons for the detention:

> [f]urthermore, *the type of detention imposed here is not likely to be exploited by the officer* or unduly prolonged in order to gain more information, because the information the officers seek [*i.e.*, contraband in the form of heroin] normally will be obtained through the search and not through the detention.[175]

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167. *See id.* at 705 n.20; United States v. Rowe, 694 F. Supp. 1420, 1423 (N.D. Cal. 1988).
168. *Summers*, 452 U.S. at 693.
169. *Id.* at 696.
170. 442 U.S. 200 (1979).
171. *Summers*, 452 U.S. at 697 (quoting *Dunaway*, 442 U.S. at 213).
172. *Dunaway*, 442 U.S. at 212.
173. *Summers*, 452 U.S. at 701.
174. *Id.*
175. *Id.* at 701 (emphasis added).

The Court distinguished the seizure in *Dunaway* "which was designed to provide an opportunity for interrogation . . . ."[176] The Court also concluded that the seizure in that case was "not likely to have coercive aspects likely to induce self-incrimination."[177]

Again, the distinguishing factors identified by the Court in *Summers* are the very reasons why the holding in *Summers* cannot justify the pretextual use of search warrants to conduct interrogations of occupants of legitimate businesses. The holding was rooted in "the justification for the detention of an occupant of premises being searched for *contraband* pursuant to a valid warrant" and nothing more.[178] Indeed, courts should not "assume that *Summers*' general rule automatically applies" but rather should "apply the analytical approach used in *Summers*" to balance "law enforcement interests and the individualized suspicion against the intrusiveness of the seizure."[179]

b. Preventing flight

The first justification of preventing flight simply does not apply to the search of legitimate businesses for business records. In a search of an inherently illegal business, such as a drug house, house of prostitution, or gambling house, it would not at all be unusual for individuals to spill out of the facility and scatter in every direction upon the commencement of an executed search. There is no question that, when people are engaged in or otherwise associated with these blatantly illegal types of activities, they know they are likely engaging in criminal behavior for which, if caught, they will be punished. They have every incentive to escape the scene of the search, both to evade arrest as well as to conceal or destroy contraband.

It is one thing, as in *Summers*, to detain an individual at his residence to determine if a valid search uncovers contraband. It is a far different matter to detain employees of a legitimate business in the execution of a search warrant for business records.[180] In evaluating the justification rooted in prevention of flight, "the distinction between searches for contraband and searches for evidence is material."[181]

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176. *Id.* at 702 n.15.

177. *Id.*

178. *Id.* at 702 (emphasis added).

179. Levito v. Lapina, 258 F.3d 156, 170 n.6 (3d Cir. 2001); *see also* Heitschmidt v. City of Houston, 161 F.3d 834, 838 (5th Cir. 1998) (acknowledging that *Summers* rejected "a completely ad hoc approach" but applying *Summers*' balancing approach where the detention at issue was more severe than that in *Summers*).

180. "The connection of an occupant to that home gives the police officer an easily identifiable and certain basis for determining that suspicion of criminal activity justifies a detention of that occupant." *Summers*, 452 U.S. at 703–04. This rationale simply does not apply to occupants of legitimate businesses.

181. *Levito*, 258 F.3d at 170.

> It is not uncommon for a search for contraband to produce items that justify an immediate arrest of the owner or resident of the premises, and a person who anticipates that a search may imminently result in his or her arrest has a strong incentive to flee. By contrast, a search for evidence — particularly complicated documentary evidence — is much less likely to uncover items that lead to an immediate arrest. Thus, even if the search is successful, the suspect may well remain at liberty for some time until the evidence is examined and an indictment is obtained. As a result, the incentive to flee is greatly diminished.[182]

In an inherently legal business, most employees may be wholly unaware that their employer is allegedly engaged in criminal wrongdoing or that federal law enforcement authorities may consider that the very jobs in which they engage and with which they support their families may further an activity that the federal government deems illegal. "[A] search for evidence [as opposed to contraband] will rarely give rise to an individualized suspicion that the occupant is committing a crime on the premises."[183]

As opposed to finding people in illegitimate businesses sitting at tables weighing cocaine or secretively operating roulette wheels, the searchers of a legitimate business are likely to find people making copies, sitting at desks, or working on computers. The individuals are typically stunned, wide-eyed, and willing to follow directions. If anything, some employees and occupiers of the premises at a legitimate business would naively be willing to stay at the scene of the search (instead of leaving for the day) as part of a voluntary effort to provide assistance to the federal agents so as to "clear up any misunderstandings" about the "obvious mistake" inherent in the decision to search "their office" or "their employer's business." Surely one would not argue that persons who are presumed innocent until proven guilty have lost their constitutional protections by remaining at their place of business to observe the search being conducted.

Searches of illegitimate and legitimate businesses are simply very different. Accordingly, the first justification for temporarily detaining individuals when executing a search warrant preventing flight is not as a great a concern in the context of legitimate businesses as it might be in the context of illegitimate businesses.

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182. *Id.*; *see also* United States v. Schandl, 947 F.2d 462, 465 (11th Cir. 1991) (noting that tax evasion is a crime that is "generally only detected through the careful analysis and synthesis of a large number of documents").

183. United States v. Rowe, 694 F. Supp. 1420, 1424 (N.D. Cal. 1988).

c. Minimizing Risk of Harm to Officers

Minimizing risk of harm to officers is the second criteria.[184] These concerns do not typically arise in white collar criminal investigations and searches of legitimate businesses.[185] Rarely are the officers in uniform and even rarer are weapons displayed or brandished during a search. To the contrary, often the federal agents are dressed in business suits with any weapons that they are carrying concealed within the agent's clothes. Because it is a legitimate business, it is highly unlikely that anyone else except the agents themselves are carrying weapons. This is a far cry from searches of illegitimate operations, such as drug houses, houses of prostitution, gambling houses, organized crime entities, or those harboring other illicit activities. In those instances federal agents have legitimate concerns about their safety and the second justification would probably have a basis in fact.

For example, in the fact scenario presented in *Wallace*,[186] federal agents executed a search upon a long-established ambulance transportation service which was engaged in the legitimate business of saving lives and providing medical attention to those in need. While the Eighth Circuit's opinion reflects that a temporary detention of the ambulance service's employees was proper pursuant to *Summers*, the court's reasoning merely assumed the presence of the second justification underlying *Summers* without articulating any detailed basis for why the federal agents who performed the search feared any harm would result from that search.[187]

The rationale stated in *Summers* for this second criterion does not apply to interrogations conducted during the search of legitimate businesses, i.e., "the execution of a search warrant to search for narcotics is the kind of transaction that may give rise to sudden violence or frantic efforts to con-

184. This criteria is somewhat similar to the so-called "public safety" exception which stands for the proposition that *Miranda* rights are not required to be given in instances in which "a situation posing a threat to the public safety outweighs the need for the prophylactic [*Miranda*] rule" protecting the Fifth Amendment privilege against self-incrimination. New York v. Quarles, 467 U.S. 649, 657 (1984) (finding that *Miranda* warnings are unnecessary prior to questioning when "reasonably prompted by a concern for the public safety"); *see also* United States v. Williams, 181 F.3d 945, 953 (8th Cir. 1999). Whether reasonable concern for public safety exists in a given situation does not depend upon the officer's irrelevant, subjective views but instead depends upon objective facts and whether a reasonable officer would conclude that there was a significant threat to public safety. *Quarles*, 467 U.S. at 656.

185. *See Levito*, 258 F.3d at 171 (the facts did not suggest that the defendant under investigation for tax crimes had any ties to violent organizations or a record for violence. Therefore, there was no compelling safety reason for detaining the defendant during the lengthy search).

186. United States v. Wallace, 323 F.3d 1109, 1111 (8th Cir. 2003).

187. *Wallace*, 323 F.3d at 1111. The authors further submit that if occupants are allowed to leave the premises instead of being detained, any claim of risk of harm would be lessened even further thereby minimizing the perceived risk of harm to the officers.

ceal or destroy evidence."[188] However, just because police have probable cause for issuance of a search warrant, this fact does not give authorization to search all occupants of a premise without probable cause.[189] A legitimate fear of harm—while perhaps appropriate with respect to inherently illegal businesses and operations—simply does not exist as a practical matter when federal agents execute a warrant to search a small town ambulance company and even a large company like Enron. Assuming that (1) federal agents executed a search warrant on the once-prominent accounting firm, Arthur Anderson, and (2) federal agents temporarily detained individuals (and perhaps questioned them) when performing those searches pursuant to *Summers*, federal agents most likely did not actually fear for their safety. Accordingly, in the context of federal white collar criminal investigations of legitimate businesses, the second justification, fear of risk of harm, as a practical matter, does not exist and thus does not outweigh the intrusion on individuals' liberties.[190]

d. Conducting an orderly search

Finally, the third justification underlying the limited detention authorized by *Summers* is identified as conducting an orderly search.[191] If so, it seems inconsistent with the stated purpose to utilize the available manpower of officers to interrogate occupants of the premises as opposed to the same

188. Michigan v. Summers, 452 U.S. 692, 702 (1981).

189. Ybarra v. Illinois, 444 U.S. 85, 91 (1979) (holding that although search warrant, issued upon probable cause, gave police officers authority to search premises of small public tavern and to search the bartender for narcotics, pat-down search and seizure of patron was not constitutionally permissible where there was no reasonable belief that patron was involved in any criminal activity or that patron was armed and dangerous).

190. *See id.* at 92–93 ("[A] reasonable belief that [a person] was armed and presently dangerous . . . must form the predicate to a pat down of a person for weapons."); *see also* United States v. Kikumura, 918 F.2d 1084, 1092 (3d Cir. 1990) ("A police officer may search a detained individual for weapons if he has reasonable suspicion that the individual could be armed and dangerous to the officer or others."); United States v. Patterson, 885 F.2d 483, 485 (8th Cir. 1989) (search and seizure upheld where officer "was armed with sufficient facts to be concerned about his safety and that of his fellow officers"); United States v. Corona, 661 F.2d 805, 807 (9th Cir. 1981) (stating that officer must "have a founded suspicion, based upon articulable facts, that [the suspect] was armed and presently dangerous"); United States v. Clay, 640 F.2d 157, 159, 161–62 (8th Cir. 1981) ("[P]rotective searches are authorized only when the police officer has suspicion that the individual before him may be armed or otherwise presently dangerous."); United States v. Cole, 628 F.2d 897, 899 (5th Cir. 1980) (requiring "that specific articulable facts support an inference that the suspect might be armed and dangerous"); Meredith v. Erath, 182 F. Supp. 2d 964, 980 (C.D. Cal. 2001) (in the context of a civil rights case, finding "no evidence the agents were attempting to prevent the flight of the occupants by detaining them" and "no evidence that any of these individuals presented any risk of harm to the agents").

191. 452 U.S. at 705.

officers helping to conduct the search.[192] Indeed, the use of officers to conduct interrogations when such officers would otherwise participate in the search demonstrates the pretextual nature of this justification. Furthermore, one must ask what would result in a more orderly search (since the warrant is presumed to facially authorize only a search of the premises and not a search of any persons): detaining all of the employees and occupants in a single room and then letting them travel from room to room throughout the premises, or not detaining them at all and letting them leave the premises? Under the second option both the governmental interest in conducting an orderly search (without undue interference) and the individuals' interest in freedom from restraint (and wrongful interrogation) are served. Courts should analyze the extent to which detention will add to the intrusiveness of the search itself, whether law enforcement officers are likely to exploit or unduly prolong the detention to gain information, and the extent to which the detention adds to the public stigma associated with the search."[193] For example, in *Leveto*, the court held that since the warrants in the case were executed by a large group of agents, once the searches of the home and hospital were underway the need to detain the defendant to prevent loss of evidence was minimal.[194]

e. Summary

The *Summers* decision is based upon the search for contraband at an individual's residence[195] and should not apply to the search for evidence at legitimate businesses. Indeed, the Court specifically did not decide the issue of "whether the same result would be justified if the search warrant merely authorized a search for evidence."[196]

If agents are truly concerned about the *Summers* justifications (preventing flight, minimizing risk of harm to officers, and conducting an orderly search), would not these interests be best served by executing search warrants of legitimate businesses during non-business hours? If the search is

192. *See Wallace*, 323 F.3d at 1111.

193. *Meredith*, 182 F. Supp. at 980 (citing United States v. Rowe, 694 F. Supp. 1420, 1423-24 (N.D. Cal. 1988)).

194. *See also* Heitschmidt v. City of Houston, 161 F.3d 834, 839 (5th Cir. 1998) (once premises is secure no justification for prolonging physically intrusive detention); United States v. Timpani, 665 F.2d 1, 2–3 (1st Cir. 1981) (agents reasonably barred the detainee from leaving or calling anyone during the first forty-five minutes of a five-hour search "until other coordinated searches were under way" to prevent premature warning).

195. *Summers*, 452 U.S. at 705 ("Thus, for Fourth Amendment purposes, we hold that a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted.")

196. *Id.* at n.20.

truly for business records (which is what is typically authorized by a search warrant of a legitimate business), why would agents execute search warrants during peak business hours when the maximum number of employees are present? It is patently obvious that federal law enforcement authorities are pretextually using executions of search warrants to conduct custodial interrogations of targets, employees, and occupants of legitimate businesses. However, the authors submit that the *Summers* Court did not intend such exploitive and pretextual interrogations.

Once the justifications underlying the authority for limited detentions expressed in *Summers* are cast aside, the authors submit that it is difficult to justify the initial rounding up and temporary detention of occupants of a legitimate business as anything other than a custodial situation, thus prompting any interrogation taking place thereafter to be preceded by the issuance of *Miranda* warnings. For these reasons, the nature of the business itself should be an additional criterion in determining whether or not certain interrogations are custodial in nature.

f. The argument for a prophylactic rule

The authors of this article suggest that the *Griffin* analysis and *Summers* analysis simply miss the point with regard to custodial interrogations. These cases focus upon whether detentions in connection with the execution of a search warrant were constitutionally permissible. Regardless of whether constitutional justifications for detentions exist, the fact remains that such detentions are custodial in nature and any interrogations trigger the *Miranda* warnings. Accordingly, the authors submit that a prophylactic rule should be applied to such custodial interrogations and the courts should require that *Miranda* warnings be given in all such interrogations.

In *United States v. Rowe*,[197] the court provided the following response to the government's argument that *Summers* allows agents to detain the occupants of premises while executing a search warrant:

> This argument misses the point. Although as is discussed in the previous section, the defendant's *detention* was justified under *Summers*, the subsequent *interrogation* of the defendant was not. The *Summers* opinion "nowhere suggests that the mere fact that a 'detention' permissible for Fourth Amendment purposes [makes] it any less 'custodial' for Miranda purposes." *United States v. Morales*, 611 F. Supp. 242, 245 (S.D.N.Y. 1985); *See United States v. Stevens*, 543 F. Supp. 929, 942-44 (N.D. Ill. 1982).[198]

197. *Rowe*, 694 F. Supp. at 1420.
198. *Id.* at 1425.

In *Rowe* the defendant was charged with assisting an escape, concealing a person from arrest, and making false statements during an investigation. The court held, with regard to statements made by the defendant in response to interrogation by the police during the execution of a search warrant, that the issue was "whether the defendant was effectively in custody when she made the challenged statements."[199] After reviewing the facts of the detention the court concluded that under the circumstances the defendant might reasonably have concluded that she was not free to leave and that she was in custody.[200] "Furthermore, one purpose of the interview appears to have been to elicit damaging responses from the defendant, who at that time was very much the target of an investigation."[201]

Likewise, in *United States v. Stevens*,[202] the defendant was charged with receiving two stolen motion pictures and infringing copyrights of those two films. There, the defendant was interrogated during the course of execution of a search warrant. In granting the defendant's motion to suppress the court stated that "[t]he detention in this case probably had two designs. The first design, permissible under *Summers*, was to allow the proper execution of the search warrant. The second design was apparently to provide an opportunity for interrogation."[203] It was clear under the facts of the case that the defendants were not free to leave until after they were interviewed by the agent.[204] "Asking them questions during this detention, without providing Miranda warnings, was improper. This was a detention for the purpose of providing an opportunity for the interrogation which led to confessions . . . and the statements made to [the agent] must be suppressed."[205] The court held that it was permissible for the agents to ask the defendants questions to identify themselves, but it was not permissible for the purpose of asking questions designed to illicit incriminating statements.[206]

Finally, in *United States v. Morales*,[207] the court held that the responses of a defendant to questions by police officers requesting the identity of the owner of heroin during the search of an apartment were the result of "custodial interrogation" and thus had to be suppressed.

> While the holding in *Summers* justified defendant's detention as an occupant of the premises for which a valid search warrant was being executed, the Court's opinion nowhere suggests that the mere fact a "deten-

199. *Id.*
200. *See id.*
201. *Id.*
202. 543 F. Supp. 929 (N.D. Ill. 1982).
203. *Id.* at 943.
204. *Id.* at 944.
205. *Id.*
206. *Id.* at 944–45.
207. 611 F. Supp. 242 (S.D.N.Y. 1985), *rev'd on other grounds*, 788 F.2d 883 (1986)

> tion" may have been permissible for Fourth Amendment purposes made it any less "custodial" for *Miranda* purposes.[208]

Therefore, the court held that when police asked, "[w]hose are these?," the officer should have known that the question was reasonably likely to elicit an incriminating response.[209] As such, it was a custodial interrogation without the benefit of the defendant's *Miranda* rights and was therefore suppressed.[210]

The detention of occupants of premises during the execution of search warrants constitutes a "seizure" under the Fourth Amendment. A seizure within the meaning of the Fourth Amendment occurs "whenever a police officer accosts an individual and restrains his freedom to walk away."[211]

Even if constitutionally permissible, detentions and interrogations of targets, employees, and occupants of legitimate businesses during execution of search warrants trigger the *Miranda* warnings. An interrogation occurs if the questions are reasonably likely to elicit an incriminating response. If the detainee has not been advised of his *Miranda* rights, any statements given and the fruits thereof should be suppressed.

2. *The Individual's Sophistication and Prior Dealings or Contact with Law Enforcement Officers*

This article focuses upon legitimate businesses which are not inherently illegal entities such as drug houses or prostitution houses. In the former types of establishments, the occupants of the businesses typically will not have had prior substantive dealings or contact with law enforcement officers and will not expect sudden police intrusions. As a practical matter, these factors place them in a much more vulnerable situation and make them much less likely to exercise their constitutional rights under the Fifth Amendment.[212] Furthermore, the lower on the management chain, the less

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208. *Id.* at 245.

209. *See id.* at 245–46.

210. *Id.* at 246.

211. Michigan v. Summers, 452 U.S. 692, 696 (1981) (finding that detention of homeowner was a seizure where he "was not free to leave the premises while the officers were searching his home"); Terry v. Ohio, 392 U.S. 1, 16, 19 n.16 (1967) ("[W]hen [an] officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen . . . we [may] conclude that a 'seizure' has occurred."; United States v. Clay, 640 F.2d 157, 159 (8th Cir. 1981) (stating that restriction of freedom to leave "by physical restraint or by sufficient show of authority" effects a seizure).

212. Miranda v. Arizona, 384 U.S. 436, 468 (1965). The *Miranda* Court recognized this fact by quoting P. DEVLIN, THE CRIMINAL PROSECUTION IN ENGLAND 32 (1958) which stated that "[i]t is probable that even today, when there is much less ignorance about these matters than formerly, there is still a general belief that you must answer all questions put to you by a policeman, or at least that it will be worse for you if you do not." *Id.* at 468. These words, the

sophistication an employee likely has in dealing with either law enforcement officials or legal matters in general.

The fact that a suspect has never previously been detained or questioned by law enforcement officials is a relevant consideration.[213] This is especially true when the officials use a "Mutt and Jeff" technique indicated, of course, in a police dominated atmosphere.[214] The Eighth Circuit has recognized that one factor to consider is the "age and experience of the person interviewed."[215] Likewise, "a suspect's language skills may be relevant to the 'in custody' issue."[216]

These are important considerations because without contemplating such important factors as the defendant's experience, age, education, linguistic abilities, prior dealings with law enforcement, and overall level of sophistication, a court cannot meaningfully consider whether or not a reasonable person in that suspect's position would have believed that he was or was not in custody at that moment. These factors are largely measurable and objective rather than subjective in nature, such that the factors are fully consistent with the objective "reasonable suspect" test.

A person's susceptibility to being compelled to speak and answer questions—thereby increasing the likelihood of incriminating himself—is obviously greater when one has had little or no experience with law enforcement officials, when one is very young or very old, when one possesses little formal education, when one's ability to speak English is relatively limited, etc. "[T]he modern practice of in-custody interrogation is psychologically rather than physically oriented."[217] Unsophisticated individuals, as well as those having previously limited dealings with law enforcement officers, will naturally be more susceptible to psychological techniques.

In applying an objective test when considering "custody," which contemplates the mindset of a "reasonable person" in the position of a suspect hampered with one or more of these attributes, such attributes should actually be taken into consideration when determining whether that suspect was or was not "in custody" at a given moment. For example, those persons involved in inherently illegal criminal enterprises will naturally be less surprised and better equipped to deal with sudden police incursions and interrogations than employees of legitimate businesses. The custodial determina-

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authors submit, still ring true today.

213. United States v. Carter, 884 F.2d 368, 372 (8th Cir. 1989); *cf.* United States v. Jorgensen, 871 F.2d 725, 730 (8th Cir. 1989).

214. *See Miranda*, 384 U.S. at 452–55.

215. United States v. Sutera, 933 F.2d 641, 646 (8th Cir. 1991) (citing United States v. Rorex, 737 F.2d 753, 756 (8th Cir. 1984)).

216. Thatsaphone v. Weber, 137 F.3d 1041, 1045 (8th Cir. 1998); *see also* United States v. Ceballos, 812 F.2d 42, 48 n.4 (2d Cir. 1987).

217. *Miranda*, 384 U.S. at 448.

tions for targets, employees, or occupants of a legitimate business differ than those for the individuals involved in inherently illegal activities.

3. *Whether the Individual Is or May Be a Target of the Investigation*

Stated another way, were the government agent's actions inquisitive or inquisitorial? If inquisitorial, as to the person being interrogated, this factor would weigh in favor of creating a custodial atmosphere justifying the giving of *Miranda* warnings.[218] The Supreme Court has recognized that these subjective beliefs may be an appropriate factor in determining custody:

> In sum, *an officer's views concerning the nature of an interrogation, or beliefs concerning the potential culpability of the individual being questioned, may be one of many factors that bear upon the assessment whether that individual was in custody*, but only if the officers' views or beliefs were somehow manifested to the individual under interrogation and would have affected how a reasonable person in that position would perceive his or her freedom to leave.[219]

In order to obtain a search warrant, law enforcement officials must demonstrate "probable cause" and have some justification to believe that illegal activity was or is ongoing. The question then arises as to whether the person being interrogated is or may be a suspect in connection with this activity. If so, this places the individual directly in a zone of jeopardy for which the Fifth Amendment protections were specifically intended. Moreover, human nature being what it is, these subjective beliefs will more often than not be manifested in objective conduct.

Courts often ignore this reality and discount whether the individual is or may be a target for purposes of custody determinations. Courts have opined that "[t]he fact that an investigation may be said to have been focused on a particular person does not necessarily make questioning custodial."[220]

"The rationale for this statement is that the investigation's focus proceeds from the officer's subjective intentions, and thus has little bearing on the suspect's reasonable belief about his situation except to the extent that

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218. *See* Rorex, 737 F.2d at 756.

219. Stansbury v. California, 511 U.S. 318, 325 (1994).

220. Beckwith v. United States, 425 U.S. 341 (1976) (questioning by IRS agent during tax investigation held non-custodial); *see also* Rorex, 737 F.2d at 755 (quoting United States v. Jimenez, 602 F.2d 139, 145 (7th Cir. 1979)); United States v. Wallraff, 705 F.2d 980, 991 (8th Cir. 1983) (stating that "[t]he fact that the investigation . . . may be said to have focused on the defendant is insufficient to render an interrogation custodial, and 'does not weigh heavily in that analysis.'"); United States v. Jones, 630 F.2d 613 (8th Cir. 1980) (questioning of defendant by FBI agents at her home held non-custodial).

the suspect is aware of the evidence against him and is aware that the investigation has in fact focused on him."[221] Such decisions apparently emanate from the United States Supreme Court's decision in *Beckwith*, which essentially held that the mere fact that a law enforcement investigation has focused upon or targeted a specific subject does not make it presumptively custodial for purposes of *Miranda*.

Likewise, in *Stansbury v. California*,[222] the Supreme Court held that "an officer's evolving but unarticulated suspicions do not affect the objective circumstances of an interrogation or the interview, and thus cannot affect the *Miranda* custody inquiry." The Court further explained, however, that

> [a]n officer's knowledge or beliefs may bear upon the custody issue if they are conveyed, *by word or deed*, to the individual being questioned . . . . Those beliefs are relevant only to the extent they would affect how a reasonable person in the position of the individual being questioned would gauge the breadth of his or her "freedom of action."[223]

Consistent with *Stansbury*, the officer's subjective intentions will likely have a direct impact upon the totality of the circumstances and the target's belief as to the custody issue. The officer's subjective intentions might be conveyed, for instance, in and through the officer's mannerisms, style of questioning, intensity of questioning, voice inflections, and the like. In recognition of this fact, the Eighth Circuit has indicated that the "subjective intent of the interrogating officer" is a factor, which should at least be considered in the "totality of the circumstances."[224]

When individuals are or may be targets, the interrogation will often take on an inquisitorial tone and nature which will more likely than not be quietly—but objectively—conveyed to the target of the investigation.[225] Such inquisitorial interrogation at some point is conveyed by the officer's words or deeds in such a manner that his "views or beliefs [are] somehow manifested to the individual under interrogation and would have affected

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221. United States v. Carter, 884 F.2d 368, 370 (8th Cir. 1989) (citing United States v. Jimenez, 602 F.2d 139, 145–46 (7th Cir. 1979)).

222. 511 U.S. at 324.

223. *Id.* at 325 (emphasis added).

224. United States v. Sutera, 933 F.2d 641, 646 (8th Cir. 1991) (citing *Rorex*, 737 F.2d at 756); *see also* United States v. Saadeh, 61 F.3d 510, 520 (7th Cir. 1995) (justifying denial of a motion to suppress because the defendant "was not the isolated target of any directed questioning").

225. *Carter*, 884 F.2d at 370 ("Although custody is not inferred from the mere circumstance that the police are questioning the one whom they believe to be guilty, the fact that the individual has become the focus of the investigation is relevant 'to the extent that the suspect is aware of the evidence against him' and his awareness contributes to the suspect's sense of custody.").

how a reasonable person in that position would perceive his or her freedom to leave."[226]

4. *Need or Justification for Interrogation and the Emphasis Placed upon Interrogation when Executing the Search Warrant*

Were there special circumstances which required an interrogation or was the search warrant used as a mere pretext for interrogating employees or occupants of the business? Did a primary purpose of the search appear to be placing federal agents in a position so as to initiate surprise interviews with targets, employees, and occupiers of a business in a police dominated atmosphere? Did the federal agents only need five officers to implement the search warrant and bring ten so that they would be able to interview individuals at the scene? Were officers assigned individuals to interrogate? Were officers given questionnaires or suggested questions to ask? All of these indicate that the officers were doing more than merely serving a search warrant but, instead, were using the search warrant as a guise to engage in interrogations of individuals.[227]

The purpose of an interrogation is a relevant factor in determining custody.[228] With this in mind, the police cannot use an unconstitutional seizure of a person in connection with a search warrant for the purpose of interrogating individuals:

> for the statements given to police after an unlawful arrest to be admissible, the statement must not only be voluntary under Fifth Amendment standards but must not be the result of an unconstitutional seizure. We evaluate four factors to determine whether statements made to the police after an illegal arrest are admissible: (1) whether the suspect has been advised of his *Miranda* rights prior to giving his statement; (2) the temporal proximity of his statements to his illegal seizure; (3) the existence

226. *Stansbury*, 511 U.S. at 325.

227. *But see* United States v. Wallace, 323 F.3d 1109, 1111–13 (8th Cir. 2003) (wherein the Eighth Circuit, based upon the facts of that case, held that a search was not custodial despite the use of a preprinted questionnaire which asked the defendant general questions about her job duties and the company's billing practices).

228. *See Satera*, 933 F.2d at 646 (citing United States v. Helmel, 769 F.2d 1306, 1320 (8th Cir. 1985)) (stating the relevant factors in determining whether an interrogation was custodial include the "accused's freedom to leave the scene *and the purpose*, place, and length of interrogation") (emphasis added); *see also* United States v. Hanson, 237 F.3d 961, 964 (8th Cir. 2001) (finding that the factors in determining custody during interrogation include "the place and purpose of the interrogation") (citing United States v. McKinney, 88 F.3d 551, 554 (8th Cir. 1990)).

of intervening causes between the illegal arrest and the statements; and (4) the purpose or flagrancy of the official misconduct.[229]

If a primary purpose of the execution of the search warrant is to interrogate potential suspects and witnesses, this purpose is beyond the scope of the search warrant and the detention of such individuals is an illegal seizure to which the exclusionary rule should apply. This indicium should militate in favor of a finding that the interrogation was custodial in nature to the extent that it resembles deceptive law enforcement tactics tactfully designed to coerce a confession or damaging admission.

VI. PRACTICE SUGGESTIONS

A. Preserving the Issue for Appeal

The issue presented in this article can be submitted to the federal district court by filing a motion to suppress evidence gathered during an improper law enforcement interrogation of the defendant conducted at the individual's place of employment (or elsewhere, as the facts may dictate). One problem which may arise is that defense counsel might not even know what the alleged statements are prior to the motion deadline or, sometimes, prior to trial.[230] Be forewarned that appellate courts have, more often than not, affirmed district court decisions holding that insufficient "cause" existed to consider an untimely motion to suppress.[231]

The reason why defense counsel might not be certain as to what, if any, statements the federal government is contending a defendant made during one of these custodial interrogations is because federal prosecutors are typically required to produce very little information in criminal cases (and some of the information that is provided may not be provided until shortly before or at trial).[232] However, upon request under Federal Rules Criminal Procedure (FRCrP) 16(a)(1)(A), prosecutors must disclose written or recorded statements made by the defendant that are in the government's

229. United States v. Reinholz, 245 F.3d 765, 779 (8th Cir. 2001) (citing Brown v. Illinois, 422 U.S. 590, 602–04 (1975)).

230. *See* FED. R. CRIM. P. 12(b)–(c) (stating that motions to suppress evidence must be timely filed on or before the date set by the court); *see also* FED. R. CRIM. P. 12(f) (finding that a failure to timely file a motion to suppress will result in a waiver; however, "the court for cause shown may grant relief from the waiver.")

231. *See, e.g.*, United States v. Scavo, 593 F.2d 837, 844 (8th Cir. 1979).

232. FED. R. CRIM. P. 16 addresses the prosecution's and defendant's discovery obligations. Brady v. Maryland, 373 U.S. 83 (1963) and Giglio v. United States, 405 U.S. 150 (1972), and their progeny, generally govern the production of exculpatory evidence by the government to the defendant. 18 U.S.C. § 3500 and FED. R. CRIM. P. 26.2 govern issues with respect to production of witness statements.

possession, oral statements made by the defendant during a pre- or post-arrest interview with a government agent, and testimony the defendant gave at a grand jury proceeding that relates to the offense with which he has been charged. Other information can be obtained under the other subsections of FRCrP 16(a)(1) (although such a request triggers an often disadvantageous reciprocal discovery obligation), but a FRCrP 16(a)(1)(A) request made early in the proceeding will form the basis of any motion to suppress a defendant's statements.

At least three motions should be filed in light of the scenario presented in this article. The first is a limited Fed. R. Crim. P. 16(a)(1)(A) motion seeking all exculpatory and inculpatory statements of the defendant. The second is a motion to disclose certain evidence which would provide the basis of a motion to suppress. The third is the actual motion to suppress.[233] Of course, the motions should be submitted accompanied by briefs detailing the relevant facts, applicable law, and authorities in support of the client's position.

B. Common Suppression Hearing Issues

Upon the filing of a motion to suppress, the defendant will generally receive a hearing pertaining to the issues raised in the motion.[234] When the motion pertains to whether or not a confession or other damaging statement should be suppressed, the district court will decide whether the assertion of the statements was made in violation of *Miranda*.[235] Before rendering its decision, the district court may receive testimony from the officers who conducted the questioning, and perhaps from the defendant in the case, as to what actually transpired during the exchange.

The defendant moving for an order seeking the suppression of evidence has the general burden of proof.[236] However, when the defendant has made a *prima facie* showing that a statement may have been compelled in violation of *Miranda*, the burden of proof shifts to the prosecution to establish that the statement was made voluntarily and not in violation of his rights. The prosecution must meet its burden by a preponderance of the evidence.[237]

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233. Because of pretrial deadlines and the government's tardiness in failing to timely respond to those motions, it may be necessary to file a motion to suppress before defense counsel has determined whether any incriminating statements were actually made.

234. *See generally* Franks v. Delaware, 438 U.S. 154, 155–56 (1978).

235. *See generally id.*

236. United States v. Feldman, 606 F.2d 673 (6th Cir. 1979).

237. *See* United States v. Matlock, 415 U.S. 164, 177 (1974); Lego v. Twomey, 404 U.S. 477, 486–87 (1972).

Finally, it is important to remember that because consideration of the motion to suppress essentially constitutes an evidentiary hearing triggering FED. R. EVID. 104(a), the Federal Rules of Evidence (FRE) will typically not be strictly observed.[238] For instance, hearsay statements may be used in determining whether or not a confession or seizure was illegally obtained.[239]

C. Appeal of a Denial or Grant of a Motion to Suppress

Defendants cannot pursue an immediate, interlocutory appeal from the denial of a motion to suppress and may only appeal the issue after they have been convicted.[240] Conversely, the federal government enjoys a statutory right pursuant to 18 U.S.C. § 3731 to appeal from a decisional order of a district court suppressing evidence (or excluding evidence, or requiring a return of seized property) in a criminal proceeding.[241] The prerequisites for such an appeal are that the defendant must not yet have been placed in jeopardy, the United States Attorney must certify to the district court that the appeal is not being pursued to delay the case, and the suppressed evidence at issue constitutes substantial proof of a material fact.[242] The appeal must be taken within 30 days after the district court rendered its ruling.[243]

VII. CONCLUSION

The reality of the scenarios envisioned by this article is that individuals present during the execution of search warrants for legitimate businesses are typically "in custody" for an often extended period of time. As a part of law enforcement investigative techniques, officers often take advantage of this window of opportunity to conduct interviews of individuals who they might not otherwise be able to interview (or at least not be able to interview as "effectively"). The police dominated atmosphere is ideal for law enforcement officers who desire to interview targets and material witnesses who are likely to be in a confused or even panicked state, and are likely to be without retained, much less present, legal counsel. It was this type of third degree interrogation practice that concerned the *Miranda* Court:

> 'It is not admissible to do a great right by doing a little wrong . . . . It is not sufficient to do justice by obtaining a proper result by irregular or

238. *See* FED. R. EVID. 104(a) ("Preliminary questions concerning . . . the admissibility of evidence shall be determined by the court . . . . In making its determination the court is not bound by the rules of evidence except those with respect to privileges.").

239. *Matlock*, 415 U.S. at 175–76.

240. *See* DiBella v. United States, 369 U.S. 121, 131–32 (1962).

241. Indeed, this is precisely what occurred in the *Wallace* case.

242. 18 U.S.C. § 3731 (2001).

243. *Id.*

> improper means.' Not only does the use of the third degree involve a flagrant violation of law by the officers of the law, but it involves also the dangers of false confessions, and it tends to make police and prosecutors less zealous in the search for objective evidence. . . . 'It is a short cut and makes the police lazy and unenterprising.'[244]

Although many of these interrogations are never brought to the attention of the court, they nonetheless constitute violations of the Bill of Rights. Courts should recognize the reality of these custodial interrogations, conducted without issuance of *Miranda* warnings, and (1) provide these persons with the protections that the authors of the Bill of Rights intended them to have and (2) further preclude Assistant United States Attorneys and federal law enforcement authorities from abusing the limited authority vested in them to conduct searches for items on the premises of legitimate businesses by also interrogating individuals present at the scene.[245]

Perhaps the best argument against the improper custodial interrogations which are the narrow focus of this article was set forth by the Eighth Circuit in *Griffin*:

> [T]he constant reluctance of law enforcement to advise suspects of their rights is counterproductive to the fair administration of justice in a free society. Effective law enforcement is not frustrated when police inform suspects of their rights. Such practices protect the integrity of the criminal justice system by assuring that convictions obtained by means of confessions do not violate fundamental constitutional principles. The contrary proposition, however, is true: Ignoring the requirements of *Miranda* is ineffective law enforcement which produces convictions that are ultimately reversed because agents of the law have not followed the dictates of the law themselves.[246]

We as a society, can do better.

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244. Miranda v. Arizona, 384 U.S. 436, 447 (1966) (quoting IV National Commission on Law Observance XXXX).

245. *See* 28 U.S.C. § 530B(a) (2001) (stating that the Citizens Protection Act, effective in 1999, provided that federal prosecutors are subject to the same extent to state laws and rules and local federal court rules, governing lawyers in the State where the prosecutor engages in the practice of law); States v. Young, 470 U.S. 1, 25 (1985) (Brennan, J., concurring) ("[W]e have long emphasized that a representative of the United States Government is held to a higher standard of behavior"); Berger v. United States, 295 U.S. 78, 88 (1935) (finding that prosecutors have a duty to seek justice and will be held to a *higher* standard of conduct than other attorneys); United States v. Shahid, 117 F.3d 322, 325 (7th Cir. 1997) (finding that prosecutors cannot utilize third parties [*i.e.*, federal agents] to violate ethical rules governing them); United States v. Feffer, 831 F.2d 734, 737 (7th Cir. 1987).

246. United States v. Griffin, 922 F.2d 1343, 1356 (1990) (citing Minnick v. Mississippi, 498 U.S. 146, 154 (1990)).